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VI  
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**AN INTRODUCTION**  
**TO THE**  
**CONSTITUTIONAL LAW**  
**OF THE**  
**UNITED STATES.**

**ESPECIALLY DESIGNED FOR STUDENTS, GENERAL  
AND PROFESSIONAL.**

**BY**

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## INTRODUCTORY CHAPTER.

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§ 1. THE systematic juridical writers among the Romans, whose works formed the basis of the compilations made by Justinian, separated the entire positive jurisprudence into two grand and opposed departments: the Public Law, and the Private Law (*jus publicum, jus privatum*). The Digest thus states the division:<sup>1</sup> "Hujus studii [juris] duæ sunt positiones; publicum et privatum. Publicum jus est quod ad statum rei Romanæ spectat; privatum, quod ad singulorum utilitatem: sunt enim quædam publice utilia, quædam privatim." Most of the modern jurists of Europe make the same classification. Mr. John Austin, the profoundest writer on general jurisprudence which England has produced, rejects this division as useless and even perplexing. Before Austin, Blackstone, in his Commentaries, had suppressed this separation of departments, and had treated most of those matters which are generally ranged under the head of Public Law, as parts of the law pertaining to persons. There can be no doubt that Blackstone's method has the merit of simplicity when the object is to present either an outline, or a complete detailed statement, of the positive rules which make up the entire internal or municipal jurisprudence of a particular nation. But when it is designed to present simply some portion of this whole, the division made by the Roman jurists, and followed by a majority of the moderns, is not only convenient and natural but necessary.

§ 2. Assuming, therefore, the department of Public Law as opposed to that of Private Law, we inquire what portion of

<sup>1</sup> Dig. Lib. 1, tit. 1, § 2.

the entire body of a positive national jurisprudence does it embrace; in other words, what does a study of Public Law involve. Here we shall discover a marked diversity among theoretical writers. Austin says: <sup>1</sup> "Public Law, in its strict and definite signification, is confined to that portion of law which is concerned with political conditions; that is to say, with the powers, rights, duties, capacities, and incapacities, which are peculiar to political superiors, supreme and subordinate." The Roman writers, in addition to the subject of political conditions, included also that of criminal law. Savigny, certainly one of the ablest and most exhaustive of modern writers, describes Public Law as containing those rules which establish the various political conditions or status, those which define crimes and apportion their punishments, and those which regulate civil as well as criminal procedure.<sup>2</sup> The ideas which lie at the basis of this classification are, that the state directly interferes, through its officials and in its organic capacity, with criminal and civil procedure, and that crimes affect the state as a body politic in a higher and more important sense than they do the private individuals whose rights may have been infringed upon by the offender, so that the punishment of the crime is intrinsically a public duty and a public act.

§ 3. The analysis of Falck is theoretically more accurate and practically more convenient than any of the preceding, and I shall adopt it as setting forth the proper bounds of Public Law, and the fundamental doctrines upon which the idea of the state and of a law for the state is based.<sup>3</sup>

§ 4. The members of a civil society are divided, in respect to the manner in which they are subjected to laws, into those who command and those who obey; and upon this division rests the distinction of Public Law and Private Law. In strictness, every individual person, in so far as he obeys, is, in

<sup>1</sup> *Lectures on Jurisprudence*, Vol. 2, p. 435, Lect. XLIV.

<sup>2</sup> *Traité de Droit Romain*, Vol. 1, chap. ii. § 9.

<sup>3</sup> See *Cours d'Introduction Générale à l'Étude du Droit*, par N. Falck, (*Juristische Encyclopädie*), chap. 1, §§ 26, 40, 41. The sections 4-12 in the text are substantially taken from Falck, with some omissions, and not a little amplification.

respect to such act of obedience, and in respect to his duty to obey, a private person; and every commandment in a civil society primarily flows from the totality of its members,—from the public,—but is formally uttered by some representatives of that totality, be these representatives monarchs, hereditary or elected delegates, or electors who choose these delegates. The Public Law, therefore, embraces all those precepts which impose duties or confer rights upon the political superiors in the state, supreme or subordinate; upon those who organically represent the state as a body politic. Those rules which control the subject members of the state in their relations with the whole body, ought in strictness to be ranged in the Private Law; but as these relations are public in their nature, the rules themselves are also considered as a part of the Public Law.

§ 5. A conception of the Public Law as a distinct division of the entire body of jurisprudence will be made clearer by ascertaining what great departments are included in the Private Law. These departments may be thus enumerated:

1st. The Civil Law proper (*droit civil*, *Civilrecht*); consisting of (a) the Law as to Persons (*jura personarum*); (b) the Law as to Things (*jura rerum*); (c) the Law as to Obligations.

2d. Ecclesiastical Law (*jus ecclesiasticum*) in those countries where the Church is regarded as having a legal status, as something more than a voluntary association. This sub-department does not exist in the United States, but does in England, and generally throughout Europe.

3d. Supervisory Law (*droit de la Police*, *Polizeirecht*).

4th. The Law as to Crimes and Punishments.

5th. The Law as to Civil and Criminal Procedure. The Private Law, therefore, includes those rules which define the rights, powers, capacities, and incapacities of various classes of persons, private, domestic, or professional; the rights of property in all its grades which may be had in or over things; and the rights which flow from contracts and all other sources of obligations between determinate individuals. It also embraces a description of those delicts or offences which the state

punishes, and which are called crimes, together with the means and methods by which these crimes are punished, and those by which civil rights and duties are protected and enforced. Finally, under the denomination of Police are ranged all those governmental means proper to maintain good morals, public security, order, health, and the like; in general, all those means which augment the convenience and promote the tranquillity of social life.

It should be carefully noticed that, although the state by virtue of its sovereignty is the source of all these rules, and, at the call of a person interested, interferes by certain classes of functionaries, such as magistrates, judges, administrative officers, in enforcing duties and protecting rights, and interferes directly in its own name and by its own authority in punishing criminals and exercising social supervision, yet all these rules primarily and essentially concern the members of the civil society in their private, individual, separate capacities; the state is not involved in its separate, organic unity as a body politic; although interested, it is rather so incidentally than directly.

§ 6. The Public Law, on the other hand, touches and affects the state in its organic unity. It regards that state as one body politic in its juridical relations, whether those relations be with its own subjects, or with other independent states. As these two classes of relations do and ever will exist, the Public Law may properly be divided into the two corresponding departments: Political Law, or State Law properly so called (*Staatsrecht*), and International Law (*jus inter gentes*, *Völkerrecht*). The department of International Law may be dismissed with this mention as entirely foreign to the purposes of this work.

§ 7. As an aid in ascertaining with definiteness what classes of rules properly fall within the division of Political Law, it will be advantageous to advert briefly to the essential feature of the state under its necessary conditions. This essential feature, without which the state cannot exist, consists in the possession of sovereign power. The nature of sovereignty, both in respect to the external and the internal relations of

the state, will be fully developed in a subsequent chapter ; it is sufficient now to say that the sovereign power consists in the collective will and in the faculty of wielding and disposing those forces which obey that will. This sovereign power should be conceived of as indivisible in its nature, and as appertaining to the totality of members of the body politic — to the entire people : for, except under peculiar circumstances, there exists no reason for excluding from participation in the common will and action either one or many of those who directly take part in the political society.

§ 8. If this idea of the primary source of sovereignty can be accepted by the German theorist, by Americans it should certainly be regarded as axiomatic, and as lying at the very bottom of our conceptions of the state, and of the political structure we have erected in accordance with those conceptions. The expression, All power proceeds from the People, is trite enough, but the full significance of the expression is perhaps not sufficiently apprehended. According to the American theory, here reproduced by Falck, sovereignty does not reside in legislators, or executives, who are chosen, nor in the body of electors who immediately choose, but in the total aggregate of persons who are members of the state, and who by the present constituted order of things are primarily represented by the existing body of electors, and ultimately, by the legislative and executive officers.

§ 9. Although it is truly said that the sovereignty resides in the aggregate of members, yet in states of a certain extent it is not possible, and even in the smallest it would not be convenient, for this totality of the people to deliberate and act. These functions of deliberation and action, which constitute the exercise of the sovereign power, are therefore confided to many, or to one, of the members of the body politic, and in that case it is often said of these persons that they possess the sovereign power. Practically, there is nothing improper in this form of expression, so long as the constituted order of things in any particular state subsists ; the totality having delegated their capacity to deliberate and act to representatives, have not generally reserved to themselves any

legal and constitutional right to recall the delegation ; such recall, when made, must be extra-legal, or extra-constitutional, or, in other words, revolutionary. How far this is true in our own country, will be considered in the sequel. The common expression referred to is, however, theoretically incorrect ; in strictness it should be said that these persons are entrusted with and wield the sovereign power.<sup>1</sup>

It is this delegation by the totality of the function of exercising the sovereign power, which creates the necessity of establishing a fixed rule to which the depositaries of this power — the various orders of actors in the government — ought to conform in their relations with other members of the state ; or, in other words, there thence arises the possibility of a constitution in a juridical sense of the term. As a consequence, a governmental power, not possessing sovereignty in itself, but only wielding it by delegation, cannot, according to the very conception of its existence, be unlimited, absolute ; although it is not indispensable that the rules which restrain it should be formally expressed. In the United States, these rules are formally expressed ; in England, they are not. That which we call an unlimited, absolute government is so in appearance only : it is one whose acts, for the time being, do not depend for their validity upon any open expression of assent by the people, or by their direct representatives. The government, on the other hand, which we usually call limited, is one that is subjected to this dependence.

§ 10. This brief analysis of the nature and mode of exercise of that sovereign power which is the essence of a state, will enable us definitely to fix the limits of the department of jurisprudence called Political Law. That department must be concerned with the extent, manner, and means of the exer-

<sup>1</sup> See Jameson, *The Constitutional Convention*, chap. ii. §§ 21-24. See, also, Austin, *Lectures on Jurisprudence*, Vol. 1, Lect. VI. Austin seems to me to have fallen into grave errors while discussing this whole subject. He either too much narrows the meaning of the term sovereign power, and confounds it with the mere capacity to exercise that power according to the constituted order of things in a particular state ; or else he utterly ignores the idea that sovereignty resides in the totality of members of a state as a political unit.

cise of sovereign power, so far as this exercise is confined to the interior relations of the state. The complete theory of these interior relations has a triple object: First, the fundamental organization of the whole of the relations which subsist between the government and the people; secondly, the established order of the functions by which the action of the political power with respect to the people may be carried on; thirdly, the manner of procuring the means and physical forces which the action of the government demands. This theory in its entirety is called *Political Law*. In a strict sense, therefore, *Political Law* is the science which investigates and describes the form and constitution of the state, and which consequently responds to the three following questions: 1st. In whose hands is placed the exercise of the sovereign power? 2d. To what laws is this exercise subjected? 3d. By what means and combinations is the observance of these laws assured?

§ 11. The actual constitutions of states have been, and are, exceedingly varied; and the political forms commonly admitted—democracy, aristocracy, and monarchy—do not express all the differences which appear in fact, because they refer only to the number of persons who exercise the power, and not at all to their juridical relations. Thus the government of our own country cannot with accuracy be referred to either of these divisions as they are commonly understood. It is certainly not a democracy; and, although not in outward form an aristocracy or a monarchy, it is subjected to the same limitations in kind, but far greater in degree, as those which are usually placed upon the latter species of government. Indeed, Austin, with theoretical correctness, ranges limited monarchies and representative republics under the head of aristocracies.<sup>1</sup> In those constitutional forms of government only which may be essentially referred to the group of aristocracies, or to that of monarchies, can there be any question of a law which limits the political power, and consequently of means and combinations to ensure the maintenance of this law. In a pure democracy, such a law is simply impossible; for, as the totality

<sup>1</sup> *Lectures on Jurisprudence*, Vol. 1, pp. 191–200, Lect. VI.



in whom alone resides sovereign power also wield that power directly, they can only be self-restrained in its exercise: no law can be imposed upon the acts of a sovereign.<sup>1</sup> In fact, the recognition of a fundamental limitive law has ordinarily resulted in the selection of a body, more or less numerous, which represents the people. But, as we have seen, the action of this body cannot imply a participation by it, as such representative body, in the sovereign power. The true import of this form of organization is, that the exercise of certain rights of sovereignty — legislation or administration, or both — is subordinated to the assent of these representatives.

§ 12. Political Law, as thus described, is finally divided into General, which presents the theory of the state in general; and Special, which confines itself to the constitution of a particular state. In the same manner, the science of Jurisprudence itself, of which Political Law is a part, is separated into General, which treats of positive law in the abstract; and Special, which is occupied with the entire municipal law of some determinate nation.

§ 13. The object of the present work is the investigation of Political Law in one of its special forms, — that of our own country, — the Constitution of the United States of America. As the People of the United States, the possessors of sovereign power, have arranged their governmental relations by intrusting the management of a portion to the central national government, and another portion to the governments of the respective states, an exhaustive treatment of the subject would require that I should separately examine not only the Constitution of the United States, but also that of each state. Thus only should we ascertain the entire scope of those juridical relations which subsist between the whole people and their

<sup>1</sup> Austin is certainly correct in his proposition that the sovereign cannot be compelled by law; his error is in determining who is the sovereign. Were his positions true, the result would be inevitable that, in the United States, there was absolutely no sovereign; for all classes of rulers, national and state, are limited by precepts which have all the attributes of positive law; and if the people, in whose name these commands are assumed to be uttered, be not the sovereign, we have none. Indeed, Austin seems practically to be driven to this conclusion.

government. But this method of treatment cannot conveniently be pursued. I shall confine myself to the Constitution of the United States as a unit, and shall refer to the state constitutions so far only as they may be implicated with the national government. I shall inquire within what sphere the state governments may legitimately act, but farther than this cannot go. What action has been taken by the inhabitants of a particular commonwealth must be ascertained by the student of local law.

§ 14. The plan adopted for the present work does not require, nor even permit, me to enter at large into the field of General Political Law. Any extended inquiry into the nature of the state and of government in the abstract, into the advantages or disadvantages of particular forms, or even into the merits or demerits of special portions of our own Constitution, would be out of place, and will not be attempted. This work is not intended to be a treatise on civil polity. But the investigation of our established order, and the interpretation of doubtful clauses in the organic law, will require some reference to these more general topics. So far as may be necessary for these purposes, and as incidental to the general design, such reference will therefore be made. There are invaluable treatises upon General Political Law, to which the student may be referred; and it seems both unnecessary and inexpedient to combine the two methods of discussion — the abstract and the special — in a single work, any farther than may be useful for explanation and illustration.

But there is another and stronger reason why arguments to convince us of the suitableness or unsuitableness of the whole plan, or of any essential feature of it, are unnecessary. The nation has passed the point in its history when any other scheme could be possible. The general form of our government, and all of its important elements, are fixed. They were deliberately and finally chosen after a discussion which surpassed in fulness and ability any other that had ever been presented to a people as an aid to their decision. Before the adoption of the Constitution, such a scrutiny was indispensable. An appeal was made to the fundamental principles of

government; the merits of various grants and limitations of power, and of various forms of organization, were carefully canvassed. The question presented was, Why should we, the People of the United States, choose this proposed scheme of government? The publications of the day, and especially the collection of letters known as the *Federalist*, contain an answer to this inquiry. But now this Constitution is fixed; no one thinks of substituting in its place any new or different form of government; no one suggests any fundamental, or even important, change in its detail. By it the nation must stand or fall. The citizen knows its excellencies and its weaknesses, its capacities and its omissions. Such as it is, it must continue to be our organic law.

This Constitution being thus accepted as a fact, and universally regarded as substantially permanent, neither the educated citizen nor the professional student needs to ask, with much solicitude, whether any particular clause is better or worse than some other which might have been incorporated in the instrument; he needs to inquire what is the meaning of this clause, and what powers does it confer or limit, and how does it affect the relations between the government and the members of the body politic. All the aids which the canons of verbal interpretation, or history, or analogies with other forms, or ethics, can contribute to the correct determination of this all-important question, may be freely used; indeed, an answer is often impossible without a resort to some or all of them. There can be no doubt that the People are strongly convinced of the excellency of their organic law; that they will not yield their convictions to the demands of any theorists; and that they will suffer no amendments except those which shall more completely carry out the ideas upon which the whole is based, which shall supply some omission, or correct some inadvertency. I repeat, the Constitution as a whole must stand. I believe that nothing but external violence can overturn it; no voluntary act of the people will displace that accustomed order which has proved to them so beneficent.

§ 15. Leaving, therefore, the branch of General Political Law, the general ideas of government and of Civil Polity, to

other writers, I shall confine myself substantially to the Constitution of the United States as it stands; to the complicated organization of political agents to whom the management of the government is confided; to the capacities, incapacities, rights, powers, and duties which have been conferred upon those agents; to the questions which have arisen and have been settled; and to those which have been discussed, but have not yet been put to rest. Or, to quote the language of Falck, I propose to answer, in respect to the United States, the three questions: In what hands has the exercise of the sovereign power been placed? To what law has this exercise been subjected? By what means and combinations has the observance of this law been assured?

§ 16. How must such a design be accomplished? In what method and by what materials must such a purpose be carried out? The Constitution of the United States is peculiar; no other one has existed in times past, or exists now, resembling it. The manner, form, and means of its study and exposition must therefore be very different from those which would be employed in treating of the Political Law of any other nation. The Constitution of England is unwritten and traditional; it has grown up by a historical development, and the historical element must enter largely into its discussion. The Constitution of France is written and formal, so far as the mere organization of the departments of government is concerned; but, in respect to the law which limits those departments, it is vague and indeterminate. And so, if we should examine the organic law of all the European nations, even when that law is written, none would be found which resembles our own.

The Constitution of the United States is peculiar in that it is all written; that it has nothing of tradition. The government and the people go to the instrument itself as the embodiment of all granted functions; the past is resorted to only for explanation and interpretation of the written word. It is, indeed, in all respects, a statute, — a statute of vast and solemn import, enacted in the name of the people, and accepted by them as the basis of all other legislation, and therefore infinitely transcending all in importance and compulsive force;

but it is none the less a statute, — an expression of legislative will in a written form.

The Constitution is peculiar in that, while it is full and extends over a wide field, and contains a large amount of detail, and expresses in a written form all the powers that are conferred upon the government, it is nevertheless not complete and exhaustive. It does not range through the entire extent of governmental action. Conferring powers of a high national character, and absolutely supreme as far as they are granted, it withdraws a very large portion of governmental powers from the agents which it establishes, and thereby causes the juridical relations between these agents and the people, in respect to the matters thus withdrawn, to be a mere negation. In short, the Constitution is a written code creating functions perfect as far as they go; but the code is partial, not complete; in respect to much which occupies the attention of European governments, it is silent.

The Constitution is peculiar in that this written scheme not only organizes and constitutes the various departments of government, but defines and limits with care and precision all the capacities with which they are clothed. It establishes a law for them which is the formal and authoritative utterance, in a written form, of the will of the people, who possess sovereign power; and it provides efficient means for assuring the observance of that law.

Finally, the Constitution is peculiar in that it furnishes a method by which the people, in a legal and constitutional manner, may partially or wholly change the form and character of their government; obviating the necessity of revolutionary measures in case the plan adopted should fail of accomplishing the high purpose for which it was designed.

§ 17. In discussing, therefore, the powers, capacities, incapacities, rights, and duties of the governmental agents, all appeals to general ideas of civil polity, all references to the analogies of other forms and other nations from whom we may be supposed to have drawn some of our methods, all purely historical deductions, are and must be constantly restrained and limited by the letter itself of the written instrument. On the

other hand, this written instrument is so much one of enumeration rather than of description ; is so much an expression of general grants of power rather than the embodiment, in a codified form, of minute detail, — that an appeal to history, to the analogies of other political organizations, and to fundamental ideas of civil polity, of justice and equity, is not entirely superseded, nay, is often absolutely necessary. The work of the interpreter is not alone verbal ; he may, to a considerable extent, strengthen his conclusions by a reference to the doctrines of General Political Law.

§ 18. The science of Political Law, as applied to the Constitution of the United States, demands from the student, the citizen, and the legislator, methods and qualities similar to those which are requisite for the lawyer and the judge in interpreting and expounding the terms of an ordinary statute. The reasons of this are obvious and imperative. The canons of verbal interpretation are everywhere the same in substance ; they only vary in respect to the character of the writing to whose explanation they are applied. The method and habit of the lawyer are essentially identical with those of the historical critic or the biblical student. In the practical application of legal principles in the common affairs of life, the written agreement, the deed, the testament, the statute, are construed by the aid of the same rules, simply because they are written. The written constitution, merely because it is a constitution, can form no exception. The most that can be said is, that, as greater interests are involved which affect the state rather than the individual, all narrow and technical construction should, as far as possible, be avoided ; the nature of the writing as an organic law should be allowed its full effect. Still, the truth remains, that the habit of thought of the lawyer is necessary to a correct understanding of the Constitution ; and as, by our peculiar organization, the courts are called upon to apply this fundamental law to the acts of legislatures and executives, in testing the validity of these acts, it follows that the most authoritative expositions of the Constitution have been, and are, made by men trained in their profession and office to the lawyer-like habit.

It is no reproach to the Political Law of the United States that this method of study is necessary. Certain theorists have complained because the legal spirit has influenced legislators, judges, and jurists in their exposition of the Constitution. These persons have entirely failed to comprehend the nature of our form of government; to discern the essential differences between it and all others existing or past.

It may be that an unwritten, traditional, elastic constitution, capable of continuous development, able, like the Common Law, to adapt itself to the changing needs of society and the state, is superior to the written. It may be that an organic law cast in the mould of an iron code has intrinsic defects which expose the body-politic to grave dangers. Upon this question there may be difference of opinion. But one thing is sure, — that the American people are unanimous in preferring their own written form. Indeed, so far from abandoning the plan, their tendency has constantly been to extend and enlarge it; and state constitutions, as remodelled from time to time, have been made more unyielding, more minute, more like an elaborate code. This tendency is no doubt to be regretted; its effects have been evil; it should, if possible, be resisted; but it conclusively shows that a written constitution, with all its results, be they good or evil, is preferred now even more decidedly than when the Convention submitted their labors to the country for approval. It cannot be denied that, by deciding in favor of a fundamental law contained in a written instrument, the people necessarily adopted with it the consequence that this instrument must be read, interpreted, expounded, in the same manner, by the same means and methods, which are appropriate to all other legislative acts. Indeed, the very advantage claimed for our American form of constitution is, that all powers, capacities, and duties are precisely defined by the written word; that there is no room left for sudden or even gradual encroachments upon the rights of the citizen; that, the writing remaining unaltered, the various departments of the government can ever be held to these plain utterances of the people's will.

§ 19. But, while it is necessary that the Constitution should,

from its very nature, be read and expounded by the aid of processes which the lawyer uses in interpreting a statute, the lawyer's technical and professional knowledge, training, experience, and skill are by no means required. In fact, the rules and principles of verbal criticism are essentially the same when applied to all writings: they are not arbitrary, but are based upon reason, and may be easily appreciated and employed by all persons of common understanding: The layman may comprehend the true meaning of a testament or of a statute as readily as a lawyer; but both would arrive at the result in the same manner; both would consciously or unconsciously apply the same rules to the resolution of a doubt, or the clearing up of an obscurity. The great mass of citizens, the electors who represent and act in the name of this body, the legislators who are chosen to carry on the constructive work of the government, are alike competent to approach the organic law in the true spirit, and interpret it with accuracy. This is the chief merit of our type of constitution, — a merit which is often claimed for codes of private law. All may read, all may understand; the only uncertainty will be that which must always inhere in language, which can never be an absolutely perfect medium for the expression of thought.

§ 20. But, while this careful, textual, lawyer-like mode is indispensable in construing the fundamental law of the United States, there is still room for the more free, wide, and statesmanlike methods. The letter of the instrument is not so imperative as to shut out all but a verbal criticism. The whole field of political action not being occupied, the question constantly arises, what is the limit beyond which the government may not pass. The grants of power being rather enumerated than described, the inquiry must continually recur, what special acts may be done by virtue of these general concessions. To answer these all-important questions may well demand the highest resources of statesmanship in the legislators who make, in the executives who administer, and in the courts who expound, the laws, — may well require of those who choose these representatives an education in the principles of civil polity far beyond that needed by any other people. The lessons



taught by history, drawn from the experience of other nations, suggested by the analogies of other governments, contained in the principles of justice and equity, may always exert their due influence upon him who studies and expounds our Constitution.

§ 21. It is evident, then, that the true method of interpretation is a resultant of these somewhat divergent forces, — a combination of the precise, strict, verbal, narrow mode of the lawyer, and the broader, freer habit of the statesman. The one looks mainly at the letter, disregarding consequences, motives, reasons — *ita lex scripta est*; the other passes by the letter, and concerns itself with great principles, with considerations of a high expediency, with far-reaching national results. From the very commencement of the present government, there have existed two schools who represent these two modes of construction. The one has unduly exalted the lawyer-like, the other the statesman-like, process. Each is in error, and disasters would surely follow were either to obtain a permanent supremacy. With the one school, the Constitution loses its character as the fundamental, organic law of a government, and sinks to the level of an ordinary private statute, to be expounded with all the technical and literal precision which would be appropriate to a penal code. By them the canons of verbal criticism are invoked without any regard to the object and nature of the instrument to which they are applied. With the other school, the Constitution loses its character of law at all, and becomes simply a starting-point from which to construct a system unwritten and traditional. The one would cramp and dwarf the energies of a growing nation; the other would remove all the barriers which have been set up lest those energies should finally become self-destructive. Combine the two, and the essential ideas of a positive law, and of a political society as the subject of that law, are preserved; the safety and stability of the government are ensured; the national development may go on uninterrupted by arbitrary restraints, and unbroken by sudden shocks. Such has thus far been the method adopted by legislators, executives, and courts, and approved by the people: let us hope that it may never be abandoned.

§ 22. The study of their Political Law is of the highest importance to American lawyers and American citizens. In no other country is the legal profession placed under such an imperative duty to become familiar with this special branch of jurisprudence. The Constitution of the United States is a law to legislatures, to executives, and to courts both of the nation and of the states; the constitution of each commonwealth is, in like manner, a law to its local authorities. Every statute, every administrative act, every exercise of jurisdiction, must be tested by, and conform to, this fundamental utterance of the people's sovereign will. Hence the bar and the bench are called upon to exercise a function unknown in other countries, — that of pronouncing upon the validity of a statute by comparing it with the Constitution, and by deciding as to the power of the legislature to enact it. English courts are constantly compelled to construe and interpret; but for them to declare an act of Parliament void, from a want of authority in that body, would be an anomaly indeed. Private rights and duties are affected by all governmental acts; and the American lawyer cannot meet the requirements of his profession, cannot maintain the private interests intrusted to him, unless he is acquainted not only with the text of the Constitution, but also with the judicial and legislative interpretation which forms the mass of our Political Law.

§ 23. The motives which should urge the citizen are far higher and more imperative than those addressed to the lawyer. Second only to his duty to God, stands that to his country; the welfare of the body-politic has a stronger claim upon him than even that of family or of self. How wonderfully has this truth, forgotten perhaps for a while, been recognized, accepted, and acted upon within the last six years! But, by the organization of our government, the welfare of the body-politic is committed directly to the citizen. Even if not an elector, he may become one; and, at all events, he may exert a controlling influence which goes to make up a part of that public opinion which carries along with it electors and the elected. Weighty as is the obligation resting upon all citizens, it assumes a deeper and more imperative nature as it affects

the educated classes, and especially the young men and young women who are preparing for the duties of citizenship by the culture received from the college, the academy, the school. Their very knowledge and discipline should fit them to give tone and character to public opinion; to lead, and not to be driven, in all political movements. Our higher institutions of learning, and our means for a widely diffused popular education, will have miserably failed in attaining the most important object for which they were designed, if they do not make young men and women better, wiser, truer, stronger American citizens. The customary course of study need not be disturbed; it performs its good office; it gives mental vigor, and imparts knowledge. But some direct and systematic instruction in the Political Law of the United States should form a necessary part of the work done not only in every college, but in every academy and common school. That this study has not been and is not thus universal, is glaringly inconsistent with the ideas upon which our government is based; it is antagonistic to those principles of popular education which have come to be regarded as axiomatic; it has been at least the partial cause of disasters that cannot be measured, of evils that well-nigh destroyed the nation itself.

§ 24. The analysis given at the commencement of this chapter suggests the general topics which fall within the department of Political Law. In applying these abstract notions to our own country, they must be modified by the peculiar character of the Constitution, by the anomalous and complicated nature of the political organization, by the double distribution of governmental functions, and by the definite limits placed upon the exercise of powers both by the nation and by the respective states.

In pursuing my design, the work will be divided into three parts, each to a certain extent independent of the others.

*Part First* will consider and answer the question, What is the Constitution, and by whom was it created? — or, in other words, will treat of the essential character of the organic law and of the body-politic which lies behind it.

*Part Second* will consider and answer the question, In what

manner and by whom is the Constitution to be authoritatively construed and interpreted? — or, in other words, will treat of the means and combinations for assuring the observance of the fundamental law.

*Part Third* will answer the question, What powers and duties are conferred or imposed upon the national government, and what conferred or imposed upon the several states?

## PART FIRST.

WHAT IS THE CONSTITUTION, AND BY WHOM WAS IT CREATED?  
THE ESSENTIAL NATURE OF THE ORGANIC LAW, AND OF THE  
BODY-POLITIC WHICH LIES BEHIND IT.

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### CHAPTER I.

STATEMENT OF THEORIES:— NATIONALITY OF THE UNITED  
STATES.

§ 25. It does not require any extended argument to convince us that the question to be discussed in the first part of this work lies at the basis of all others. Upon the conceptions we form of the essential character of this organic law, and of the body-politic which lies behind it, must depend our notions of all the relations of the United States and the several commonwealths to each other, and of all the functions of the general and local governments. Is this Constitution the fundamental law of a nation? Then the government must, to some extent, possess national and comprehensive powers. Is it, on the other hand, a mere league, treaty, or articles of agreement and federation between sovereign and independent nations, who thereby delegate a portion of their inherent powers to the agents thus constituted? Then the powers must be limited by the very letter of the instrument which creates this agency, and are virtually under the management and control of the sovereigns who have delegated them. We are met, then, at the very threshold of the political structure we are to examine, by this most momentous consideration; and to it we should give our careful and candid thought and attention. The views we shall adopt will give shape and color to all our

subsequent opinions upon the various matters which shall come under discussion. If we shall fall into error here, that mistake will follow us through our entire course of exposition. If we are correct here, we shall hardly deviate far from the true path in our future progress.

§ 26. The statesmen and jurists of our country have perceived the necessity of establishing this fundamental point, and have devoted to the solution of the question all the resources of learning, eloquence, and partisanship. It was first mooted during the existence of the Confederation; it was the subject of animated debates in the Convention; it was discussed with extremest zeal while the Constitution was before the people, awaiting its adoption; it formed the subject of the first judicial investigation made by the Supreme Court into the powers of the general government; it has since received the attention of all the public men who have directed the course of popular opinion; it might have been considered as settled, so far as united legislative, executive, and judicial construction can establish any controverted doctrine; but it again arose in these late years, and passed from the forum and the senate-house, from the arena of peaceful debate and the contests of intellect, to the arbitrament of the battle, to the fierce discussion of the battery and the bayonet, to be finally and forever put to rest by the force of the nation wielded in solemn war.

## SECTION I.

### THEORIES WHICH HAVE BEEN PROPOSED AND ADVOCATED.

• § 27. If we examine and compare the various writings of public men and the arguments and judgments of courts, which have been put forth at intervals during the existence of the present Union, we shall discover that three theories have been proposed and advocated, by different schools of statesmen and jurists, in relation to the essential character of the Constitution itself, and of the United States as a body-politic. These theories I shall state in a manner as brief and precise as possible.

It is not claimed that all legislators, judges, or statesmen, who have been ranged on the one side or on the other, have expressed themselves in the same unqualified terms. While some have followed out their processes of reasoning to the inevitable results, others have stopped short of the logical conclusions from their premises. Others still, and among them some of the most eminent, have seemed to hesitate between two; while advocating measures, or rendering decisions, which appear to result only from the adoption of one of these theories, they have used language appropriate entirely to another.

§ 28. I. The first theory regards the United States as a nation, and its Constitution as the organic, fundamental law of that nation. This nation, or in other words the collective People of the United States as a political unit, existed prior to the adoption of the Constitution, and was not therefore called into being as a consequence of that instrument. The Constitution was not the work of the separate states, regarding those states simply as organized governments; nor of the peoples of those states, regarding those peoples as separate and independent sovereign aggregates or communities; but it was the work of the People of the United States as a whole, as a political unit, — not voting together, it is true, in the process of adoption, as a consolidated mass of electors, but, for reasons of policy and convenience, acting in their respective commonwealths. As a necessary consequence, the powers held by the general government were not delegated to it by the several states, regarding those states simply as organized governments; nor by the peoples of the several states, regarding those peoples as separate and independent sovereign aggregates or communities; but were delegated to it by the People of the United States as a whole, abstracted from their local relations to the various commonwealths of which they were also members; although, in the very process of delegation, this one people did not vote together as a consolidated mass of electors, but, for certain reasons of policy and convenience, acted in their respective states. The powers not thus granted by the people of the United States to its general government

were not reserved *by* the several states *to* themselves; for, as these states as such did not grant any powers, they could not reserve any. But they were reserved *by* the People of the United States *to* themselves, or *to* the several states. Thus the People of the United States, as a nation, is the ultimate source of all power, both that conferred upon the general government, that conferred upon each state as a separate political society, and that retained by themselves.

§ 29. This, in substance, is the view of the Constitution advocated by Hamilton, by Jay, by Marshall, by Story, by Webster, and upheld by the judgments of the Supreme Court during its earliest years, and while it continued under the leadership of its most illustrious head, Chief Justice Marshall. I would not be understood as claiming that all these great men have maintained the whole of the foregoing propositions in an unqualified manner; and particularly it is conceded that the last of the series — that which relates to the reservation of powers to the states by the People of the United States, and not by the states themselves — has rather been implied, than clearly and dogmatically stated, by many of the adherents of this school. Even Marshall and Webster, the great champions of the inherent nationality of the People of the United States, have sometimes used language more appropriate to advocates of the theory to be thirdly stated. But I give the foregoing abstract, without hesitation, as embodying necessary and legitimate conclusions from the whole course of their reasoning; while, by most of the earlier expounders, all these results were reached without hesitation, and were set forth in language pointed and cogent, and in a manner unreversed. In the most recent times, this theory has been developed with great precision and fulness by writers and juridical students of eminent ability and learning. Among these may be mentioned John Codman Hurd, in his “*Essay on the Law of Freedom and Bondage in the United States*,” — a treatise which, more than any other American work, has received the commendation of European jurists; O. A. Brownson, in his “*American Republic*”; and George P. Marsh, in a series of letters communicated to the “*Nation*.”



§ 30. II. The second theory denies that the United States is now, or ever was, in any true sense of the term, a nation. It assumes that, by the revolt of the colonies, there resulted thirteen independent and sovereign states or nations; that these thirteen states retained their separate sovereignty during the confederation; and that they did not resign this high attribute under the present Constitution. It does not regard that Constitution as an organic and fundamental Law for a single body-politic, but as a compact, as an instrument in the nature of a league, treaty, or articles of association between the separate, independent, sovereign states. It represents these several sovereign states as granting or delegating a portion of the supreme powers which they possessed to the government of the United States, which they had thus constituted as a limited agent, for all and for each of them, to fulfil certain well-defined duties, and assume certain well-understood functions, which this agent could advantageously fulfil and assume. As a consequence, this agent — the general government — possesses no powers but those given in express terms, or by implication absolutely necessary. Nor has it the capacity by itself, or by any of its departments, — legislative, executive, or judicial, — to decide, with authority and as a finality, of the extent of those delegated powers; but the sole capacity to determine this most momentous question rests with each particular state for itself. In the practical operation of this capacity of determination, no state is in the least bound by act of Congress, order of President, or judgment of Supreme Court, nor even by the decisions of its sister commonwealths, but may judge finally and conclusively for itself. As a further consequence of this inherent capacity of determination, any state, after it has authoritatively decided that the general government has transcended its proper limits, has assumed and exercised functions not belonging to it, may treat the compact as broken, the trust as forfeited, the agency as ended; and may retire from the confederacy, thus resuming all the powers which it had before delegated to the United States. Lastly, as the several independent, sovereign states were the principals which intrusted a portion of their attributes to the general

government, they reserved to themselves the residuum not thus expressly parted with ; and are therefore, in theory and in fact, the source of all political functions both of themselves and of the United States. We are, then, not one nation, one people, but an assemblage of nations, united for some specific purposes by a friendly league into a loose federation. No citizen, therefore, owes allegiance to the United States, as Mr. Mason, of Virginia, observed in the Senate ; but each person owes allegiance only to the State of which he is a member.

§ 31. This theory found friends and advocates at the very earliest period of our existence as an Union, and has continued to receive the support of a large number of public men down to the present time. Mr. Jefferson gave it the aid of his powerful influence in his private correspondence and in many of his public acts, although, while at the head of the nation as President, he practically abandoned it. It received a new impetus from the vigorous, keen, impracticable intellect of Mr. Calhoun, in whose writings it was pushed to its logical consequences, and whose disciples have most zealously propagated their faith until it became an acknowledged article in the political creed of most Southern statesmen, and did not want believers in all other sections of the country. It has, however, never received the assent of Congress, or of the Executive, or of the Judiciary of the United States, although many representatives and senators, and a few judges, have attempted to commit their respective departments to its cause. Baffled in the legislature and the courts, it finally sought the field ; and, as it appealed to the sword, may not American citizens in all portions of our common country unite in the devout hope that it has perished by the sword ?

§ 32. III. A third system of construction occupies a middle ground between these two extremes, and, while avoiding the pernicious and destructive consequences of the latter, does not adopt all of the enlarged and national views of the former. This theory regards the states as originally independent, sovereign commonwealths, but as having surrendered to the United States a portion of their sovereignty, to be held, not at the will and pleasure of the single states, but absolutely

and irrevocably. While the states, therefore, and not the people of the nation as a political unit, are the source of all power given in the Constitution, that instrument was not designed as a mere compact or league between independent sovereignties, but as a firm and lasting organic Law for the newly created political body, and is to be expounded, construed, and interpreted by the governmental authorities therein established. All powers, however, not expressly granted by the states are reserved and held by themselves; and to that extent they retain their ancient sovereignty.

§ 33. It may be asked how this last theory practically differs from the first. I answer, in some respects not at all; in most respects widely and radically. According to both, the United States is a nation, — by the former, to all intents, and with all powers within the scope of the functions committed to the government or reserved to themselves by the People; by the latter, to a limited intent, with only those special powers conferred upon the government by the states. Following the former, we naturally adopt an enlarged and liberal mode of interpretation; following the latter, we are compelled to restrain and narrow the development of national life. The former looks to the United States as the country, the home, the centre of hopes, ambition, patriotism, and devotion; the latter rather regards the individual state as possessing the first place in our affections, and ourselves as children of the particular commonwealth rather than of the mighty Union one and indivisible. On the other hand, both deny the right of a state to exalt its own judgment as the sole criterion by which the duties of its members are to be measured; both pronounce the assumed privilege of seceding from the Union as a political heresy of the deepest dye; both regard the Constitution, and the laws made in pursuance thereof, as paramount over all local and state legislation.

§ 34. Among the leading supporters of the last theory may be named Madison and Jackson. It also lies at the basis of the judgments of the Supreme Court upon constitutional questions rendered during the presidency of Chief Justice Taney. It had perhaps been adopted by a very large portion, if not

indeed by a majority, of politicians. The events of the last six years, and especially those growing out of the close of the war and the readjustment of disturbed relations, would seem to have brought the first theory into greater prominence; and it may probably become the one accepted by the government and the people.

## SECTION II.

## MEANING OF THE TERMS "NATION" AND "POLITICAL SOVEREIGNTY."

§ 35. To put each of the foregoing theories separately to the test would involve needless repetition. A single analysis will be sufficient to disclose the essential nature of the Constitution, and of the body-politic which lies behind it. This analysis will consist of two separate and independent branches, namely, —

1st. A<sup>n</sup> historical sketch of the political movements which terminated in the adoption of the Constitution; and,

2d. An examination of the provisions of that instrument itself.

But, as a preliminary to this investigation, it is absolutely necessary to form clear and accurate conceptions of the meaning of certain terms, — terms much used in ordinary discourse, but yet often employed in a vague and doubtful manner. Very much of the difficulty in all verbal disputes arises from the want of accurate definitions; and this is true in politics as well as in philosophy and religion.

§ 36. Let us at the outset, therefore, attempt to obtain some correct and fixed notions of the term "Nation,"<sup>1</sup> and of its indispensably related term, "Political Sovereignty." The facts represented by these words necessarily imply or presuppose each other. There can be no nation without political sovereignty, and no political sovereignty without a nation. I shall

<sup>1</sup> Writers on public law use the word "State" in the sense in which I have employed the word "Nation." But as the word "State" has been indissolubly connected with our local commonwealths, great confusion would result from the employment of it, in this discussion, in its more general sense.

not be able, therefore, to separate these ideas, and to present each as distinct from the other. As well might one attempt to give a scientific description of light and of color without reference to their mutual relations and combined existence.

§ 37. And first, the distinction must be carefully and constantly preserved between the nation, and the government which that nation has actively created, or has passively permitted, as the agent for the expression of its supreme will. The people themselves, the entire mass of persons who compose the political society, are the true nation, the final, permanent depositary of all power. The organized government, whatever be its form and character, is but the creature and servant of this political unit which alone possesses dominion in itself. It is true that the people, the nation, may have either actively constituted or passively admitted the rulers to be the sole channels and means through which their sovereign power shall be ordinarily wielded and directed for the national purposes, and may have bound themselves not to resume the direct and efficient management of that power except in certain well-defined and established methods; nay, they may have restricted the government itself in the exercise of its functions, so that beyond certain appointed limits it cannot go, and thus may have denied to this government the rightful use of all the attributes of sovereignty which they themselves possess, so that for the time being these attributes cannot be brought into play by either; but it is no less true that these attributes still potentially exist in the nation, ready to be called forth whenever the people shall see fit to follow the defined and established methods, and to put their inherent, paramount force in motion.

§ 38. This great principle of human rights and of political science, which was distinctly announced to the world and first practically acted upon by our own forefathers, and which is theoretically admitted by most writers on Public Law, has been virtually overlooked or forgotten by many supporters of the "State Rights" theory, in the protracted discussions that have arisen upon the Constitution. The nation and the states have been continually confounded with the mere ruling appa-

ratus or governments of these societies. All powers have been denied to the nation except those conferred upon its limited government, and as a consequence the very existence of a nation at all has been also denied.

The intentional ignoring, or tacit rejection of the same doctrine, is the fallacy which runs through the whole of Mr. Austin's elaborate lecture upon the nature of the independent political society and of political sovereignty found in the first volume of his "Province of Jurisprudence," and which thus destroys much of the usefulness of that treatise.

§ 39. It is certainly unnecessary for Americans to argue in favor of the correctness of this principle. Our whole political structure, our whole civilization, is based upon it. So true is it to nature and humanity, that not only have European publicists adopted it, but even the European governments do not now reject it; and some of the most arbitrary claim to wield their power by virtue of an authority derived from its practical recognition. The idea that the rulers, whether one or many, compose the state, is a thing of the past, a notion which has been swept away in the resistless march of social development.

§ 40. The foregoing postulate being accepted, a nation, in its strict sense, may be defined to be an independent, separate, political society, with its own organization and government, possessing in itself inherent and absolute powers of legislation. It may not, from some peculiar features of its voluntarily created or permitted form of civil order, have enabled its rulers to call into efficient action all of these inherent and absolute powers of legislation, and it may have restrained itself, by solemn and fundamental enactments, from exercising these complete powers except by a course, and in a manner, distinctly defined and established; yet so far forth as it possesses these attributes without limit, and so far forth as it has clothed its constituted rulers with functions which involve these attributes under limits, it knows no superior to itself, it is not subordinate to any other political society or government.

§ 41. Such a political society is a nation; this nation pos-

sesses political sovereignty. It may have any organization, from the purest democracy, to the most absolute monarchy; but considered in its relations to the rest of mankind and to its own individual members, it must exist, to the extent at least of enacting laws for itself, as an integral, independent, sovereign society among the other similar nations of the earth. Its government, or in other words, the permanent agents which it has established to make efficient its organic will, must be so far independent, that no other power may authoritatively control its legislation, no other state may interfere, and, according to any received and admitted constitution of things, prescribe what the law shall be.

§ 42. From this description of the "Nation" and of "Political Sovereignty," it is evident that the latter term especially is often used in a sense far from correct, falling far short of the fulness of meaning which legitimately belongs to it. If we may properly apply the word sovereign to political societies which are really subordinate, because within their subordinate sphere they possess a large mass of political powers, and can lawfully act throughout a wide range over their immediate subject inferiors, then we may with equal propriety describe as sovereign any society or person that occupies a position of superiority simply in relation to others who are dependent. In truth, the term sovereign, used as a word of political import, is the expression of an absolute idea; it does not admit any notion of grades, of inferiority, of dependence, or of division.

Of course, I purposely put out of view the supremacy of God over nations as well as over individual men, for I am speaking only of the character of civil societies in their relations to each other and to their own members.

### SECTION III.

THE PRINCIPAL PROPOSITION IN REGARD TO THE NATURE OF THE CONSTITUTION AND THE NATIONALITY OF THE UNITED STATES.

§ 42 a. The meaning of the terms Nation and Political Sovereignty having been thus explained, I purpose to show that

the United States fulfils all the requirements which have been mentioned as necessary to the existence of a nation ; that the people thereof is an independent, separate political society with its own organization and government, possessing in itself inherent and absolute powers of legislation ; that by its Constitution it has created a government as its agent for making its will efficient, but has therein expressly prevented that agent from calling into action all of its inherent and absolute powers ; that by the same Constitution it has also restrained itself from exercising those powers in their full measure, except by methods carefully defined in the same instrument ; that by pursuing these methods there is no limit to the operation of the national force ; that its attributes are self-existent and not derived ; that it knows no superior ; that no other civil society may authoritatively control its legislation, or judge of the extent to which that legislation may be carried.

§ 43. On the other hand, in respect to all these particulars which truly constitute a nation, each state must be described in terms the exact opposites of those employed in reference to the United States. Each state is not an independent, separate political society ; it does not possess in itself inherent and absolute powers of legislation ; the functions of its rulers are limited not only by its own local constitution, but by that of the Union, and cannot be indefinitely enlarged by any amendments of its own organic law, for the organic law of the nation binds it by an irresistible sanction ; another political society not only may but must control its legislation and judge of the extent to which that legislation may be carried. Instead of enjoying attributes of sovereignty, each state, as a separate political society, is in a position of permanent subordination.

§ 44. Of course I am now speaking of the United States and of the several commonwealths under our present civil order, as that is adjusted by and through the existing organic law. I make no reference to the event of a revolution, and the results which such a catastrophe might produce ; for revolutions are accomplished not according to law and the estab-



lished order of things, but against law, and by the destruction of the constituted authority.

The propositions here stated will be illustrated in the two succeeding chapters by a historical sketch, and by an examination of the Constitution itself.

## CHAPTER II.

### HISTORICAL SKETCH OF THE POLITICAL MOVEMENTS WHICH TERMINATED IN THE ADOPTION OF THE CONSTITUTION.

#### SECTION I.

##### THE PERIOD PRIOR TO THE CONFEDERATION.

§ 45. THE nature of the civil polity which existed during the earlier periods of the revolution and subsequently under the Confederation, is an element of the utmost importance in determining the character of the present Union. It has long been too much neglected by statesmen and political writers; but its controlling effect was recognized by those men who had passed through the struggle of the war and the disastrous experience of the Confederation, and were called upon by their official positions to fix the limits of the new-made government. In very recent times, during the search for first principles and solid foundations quickened by the late war, the attention of American publicists has been again more strongly drawn to this vital subject, and it has been examined with more care, and illustrated with more fulness, than ever before.

§ 46. Those who have adopted either the second or third of the theories set forth in the preceding chapter, have expressly assumed as their fundamental position, and many who should be ranged among the supporters of the first have at times seemed tacitly to admit, that whatever of a national character we possess dates from the first establishment of the present Constitution; that by or through this instrument the people of the states were for the first time drawn together into an union which might properly be termed a nation; that prior thereto the several states were confessedly sovereign, inde-

pendent commonwealths. The advocates of the second, or "State Rights" theory must of necessity maintain this position; but from those who hold to the essential, perpetual, and supreme nationality of the Union, this concession is not the mere surrender of a verbal point; it is the abandonment of a great principle, and is not only impolitic, but unnecessary, being entirely contrary to the truth. We have now to deal with plain historical facts, not with theories, nor with disputed questions of intention. Whatever these facts may be, we cannot change them by argument, nor escape from their legitimate consequences. I repeat, the condition and character of the political society prior to, and at the time of, the adoption of the Constitution, is a fact, to be ascertained in the same manner as any other matter within the province of history.

§ 47. Prior to the revolt which terminated in the war of the Revolution, the colonies were not a single nation, nor were they thirteen separate nations. They possessed, singly or in combination, none of the powers and attributes of nationality. Each was independent of the others so far that the collective inhabitants and local governments of each had no authority over the inhabitants nor within the territory of the others. But each was a dependency and an integral part of the British empire. As a result flowing from this common dependence, the inhabitants of each possessed certain rights and privileges within the territories of all the rest; the people of each owed common allegiance to the crown, and were under a common subjection to the imperial government of the King and Parliament. It is true that from their proximity, their one language and religion, and the general identity of their interests, a feeling of unity and nationality had to some extent become spread through the colonies; but this was as yet a mere sentiment, and would continue such until, as it deepened in intensity, it should result in united acts of the whole people which should proclaim that people one nation.

§ 48. Such acts were done. Difficulties arose between certain colonies and the imperial government; and these proving too serious for peaceful adjustment, resort was had to violence.

In their first appeal to arms, in their first movement toward separation from the British empire, the people of the colonies acted as a unit; and from this epoch dates our national existence, dates the birth of a political society now known as the United States of America. The revolt was not the work of the colonies acting separately and independently, in any assumed sovereign capacity, but of the people of all these local communities acting together through their representatives in the Continental Congress, which assembly, though revolutionary, provisional, tentative, and loosely organized, was essentially national.

§ 49. On the 5th of September 1774, delegates to the first Congress assembled at Philadelphia. They were appointed from the different colonies; in some by the popular branch of the legislature, in others by a convention directly chosen by the people.<sup>1</sup> With a correct understanding of the real condition of affairs, and of their own character as representatives, these men styled themselves in their formal acts "the Delegates appointed by the Good People of these Colonies."

The government thus formed was, in truth, revolutionary; it was not intended to be permanent; but it exercised in fact and of right a sovereign authority, not as the delegated agents of the local governments of the separate colonies, but in virtue of original power granted by the people. Their acts were all of a national character. They forbade the importation and exportation of articles of merchandise from and to Great Britain and certain of its dependencies; they passed a Bill of Rights; they stated their common grievances, and adopted an address to the king and to the British people.

§ 50. On the 10th of May, 1775, a second congress of delegates was held. These were chosen in some of the colonies by the popular branches of the local legislatures, but in most by conventions directly elected by the people.<sup>2</sup> Their measures were still more national. They assumed to regulate commerce, to provide a supply of funds, to raise an army, to construct a navy, to establish a Post-Office Department, and to do many other acts, all looking toward a complete separa-

<sup>1</sup> See 1 *Story on the Constitution*, § 200.

<sup>2</sup> *Ibid.* § 203.

tion from the British empire.<sup>1</sup> Finally, they issued the Declaration of Independence, and thus at one blow cut off all connection with the mother country, and consummated the process of national birth which had been begun two years before.

§ 51. What is the result to be deduced from these events? Prior to the Declaration of Independence the colonies, separately or unitedly, did not assume to be, nor were they, independent, sovereign states. In theory, they still spoke of themselves as dependencies of the British crown, seeking redress by force, but ready to return to their obedience whenever that redress should be granted. Practically they were in a condition of revolution; the words of duty in their public acts were mere words of policy, their deeds had another meaning. But in their progress toward independence they acted in concert from the beginning, and this concert was not one of mere league or compact, but of organic unity. The boundaries which separated one colony from another were unaltered; the local legislatures were preserved; the congress of delegates assumed but limited powers; but so far as they asserted independence it was the assertion of the nation and not of thirteen sovereign nations. Nor did the delegates derive their authority in fact from the colonial legislatures, but from the one people acting behind and superior to these legislatures, acting as a political society, and exercising the attribute of sovereignty which belongs to such a body politic. Beyond all question the idea of nationality was not distinctly presented to their minds; they did not evolve a completed theory of the nature of their civil polity, and proceed to carry out that theory. They were guided by circumstances, and as events led them to acts of nationality they followed unhesitatingly.

§ 52. Again, the Declaration of Independence was not the work of thirteen separate colonies, each acting in an assumed sovereign capacity, but of the United Colonies acting in a national capacity through their delegates in congress assembled. This congress did not propose the declaration to the states and recommend its adoption by their local legislatures;

<sup>1</sup> See 1 *Story on the Constitution*, § 203.

nor did it need such endorsement to give it validity; state ratification when made was a work of supererogation. The declaration was finally and forever established by the whole independent political society through the means which they had appointed. The language of the instrument itself indicates its nature and its origin. Nothing is said of the independence of the several states, but the operative clauses indissolubly combine the idea of organic unity and nationality with that of independence. "We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." It is evident that in this clause, the words "free and independent states," "united colonies," "good people of these colonies," are used in a collective sense, to describe the one political society which was declared to be independent and to possess sovereign powers.

§ 58. No single colony, therefore, by this organic act revolted and claimed separate independence. It is true that New Hampshire, New Jersey, and South Carolina, had, prior to July 4th, 1776, adopted new constitutions for themselves; but these were all made in pursuance of a resolution of Congress of the 3d and 4th November, 1775, recommending the states to form such government "as would best promote the happiness of the people . . . during the continuance of the dispute with Great Britain:"<sup>1</sup> and they were all expressly declared to be temporary, and to exist only until a

<sup>1</sup> See Jameson, *Const. Conv.* § 127. See also § 128, for a second resolution of May 10, 1776.

reconciliation should be effected with the mother country.<sup>1</sup> These constitutions were, therefore, political steps toward independence, but not absolute assertions of that condition. Virginia had acted more decisively. On the 29th of June, 1776, she had declared "the government of this country as formerly exercised under the crown of Great Britain totally dissolved."<sup>2</sup> But this was a declaration, not that Virginia, but that the whole united colonies were independent; it only shows that the statesmen of Virginia in those early days had a true understanding of their relations to the other colonies and to the nation; they then recognized the existence of one country, and that country not the State of Virginia, but the United States of America. Who then became independent by this organic declaration of the people's will? Not Massachusetts, not New York, not Virginia, but the nation. To whom did that political sovereignty pass which had before been vested in the empire of Great Britain, acting through its king and parliament? Not to Massachusetts, not to New York, not to Virginia, for these political societies had not declared themselves independent, but to the United States of America.

§ 54. But it may be asked, if this proceeding was national, when and how did the colonies become one nation? The answer has already been partially given. The people, in the first expression of their organic will by the appointment of delegates to a general congress, took the initiative in their progress toward nationality. They clothed these delegates with undefined powers for the public good; the delegates finally, in the exercise of these powers, declared the country free and independent of the British crown; the people, by their acquiescence in this declaration, completed the birth of the nation. There never was, in fact, a moment's interval when the several states were each independent and sovereign. While colonies they unitedly resisted, revolted, declared that combined political society independent. The blow which severed the connection with the British empire, did not leave a

<sup>1</sup> See Jameson, *Const. Conv.* §§ 131, 133, 139.

<sup>2</sup> 1 *Story on the Constitution*, § 211.

disintegrated mass made up of thirteen communities now independent; it left an united mass, a political unity, a nation possessing the high attributes of sovereignty which it had just exercised. The United States was then a fact, and no power but that which called it into being — the People — is competent to decree the national destruction.

§ 55. I have dwelt somewhat at length upon this point because I esteem it to be of vital importance to a proper understanding and construction of the acts and proceedings of the people of the United States in the adoption of the present Constitution. It is the key to the whole position. Grant that in the beginning the several states were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun. If at the outset the political society consisted only in a weak agglomeration of thirteen separate nations, each of these nations must have possessed all the powers which belong to any other independent sovereignty in the world. Among these attributes, the one which underlies all others, and is, in fact, necessarily implied in the very conception of separate nationality, is that of supreme, continued self-existence. This inherent right can only be destroyed by overwhelming opposing force; it cannot be permanently parted with by any constitution, treaty, league, or bargain, which shall forever completely resign or essentially limit their sovereignty, and restrain the people from asserting it. They may at any time throw off the obligations of constitution, treaty, or league; however solemn and formal may have been the stipulations into which they have voluntarily entered, these exist only during their own good will and pleasure.<sup>1</sup>

<sup>1</sup> This doctrine that a sovereign state cannot bind itself by any treaty or compact by which its sovereignty is wholly or substantially surrendered or lessened, is now maintained by the leading writers on Public and International Law. In the expressive language of one of these writers, "For moral beings as well as for individuals, there can be no obligatory promise, when this promise is of suicide." See, on this subject, Martens, *Precis du Droit des Gens*, § 52 (Paris, 1864); Ortolan, *Diplomatie de la Mer*, liv. 1, ch. v. p. 90 (Paris, 1864); Hautefeuille *Des Droits et des Devoirs des Nations Neutres*, t. i. pp. 8-10 (Paris, 1858); Heffter, *Droit International*



§ 56. Now it is claimed that these highest attributes of political sovereignty belong, and from the very beginning have belonged, to the people of the United States, one and indivisible. If, on the contrary, they originally pertained to the thirteen states in their separate capacities, they have never been permanently surrendered or essentially limited, simply because they cannot be thus forever parted with; and as a consequence they may be resumed and exercised at will. Thus have the extreme opponents of nationality reasoned with irresistible logic from the premises assumed by them — the original sovereignty of each state. Believing as I do that their conclusions are false in theory and in fact, and destructive of all that is admirable in our national union and constituted government, I see no escape from these results if the premises are granted upon which their whole argument is based.

But the premises should not, need not, be granted. It is demonstrable as a fact of history, as to which there can be no mistake, and which cannot be changed to suit the demands of conflicting theories, that the people of the United States, through their own positive act done in their own name by their delegates, sprang into self-existence as an organic political society possessing sovereignty, and that the separate states, as individual bodies politic, were never independent, never clothed with the attributes of nationality.

## SECTION II.

### THE PERIOD OF THE CONFEDERATION.

§ 57. In the further development of this branch of the subject, I shall now examine the origin and character of the Confederation which preceded the existing government.

Although as a grand historical *fact*, the revolt and the Declaration of Independence were the work of, and had resulted in, one nation, yet it must be at once conceded

*Public*, § 83 (Paris, 1866); Pinheiro-Ferreira, *Note* to § 58 of Martens (ed. of 1864).

that the theory was not yet perfected in the minds of the revolutionary leaders, or of the people themselves. It is not possible for any community to shake off, by one voluntary act, the habits of thought, prejudices, and opinions, which have formed a part of their common life for generations. Under the influence of high-wrought feeling, or of a clear conception of duty or interest, a people may temporarily throw aside their former habitual modes of action, and for a time adapt themselves to a new state of social existence; but as soon as the paroxysm is past, as the flow of enthusiasm has receded, the conceptions of duty and interest become less clear, and the community gradually returns to its old customs, thoughts, and methods. Our revolutionary fathers were no exception to this rule. While colonies they had regarded their political societies as distinct; some jealousies had continually existed among them; some difference of interests had ever kept them apart. The necessities of their position, the absolute impossibility of separate revolts, the presence of a common danger, and the sentiments of an exalted patriotism, for a while swept away and buried all these local prejudices, these attachments to colonial or state independence. The interests of the whole were for a time regarded as paramount, and placed far in advance of the interests of the several parts. This perfect unity lasted long enough to produce that glorious offspring, the People of the United States, — that new-born Nation, destined in the providence of God, I reverently believe, to be the example and teacher to all the nations of the earth, an example and teacher by its errors and punishments as well as by its excellencies and prosperity, until, being made perfect through suffering, it shall wield an influence over humanity even surpassing that exerted by the deathless empire of Rome.

§ 58. But soon after the formal act which asserted the national independence, state pride, interests, and influence, began to be felt plainly and powerfully in our national councils. The former habits were too strong to be forgotten, and they soon returned with even increased power. A government must be formed to take the place of the exist-

ing one, which was regarded as revolutionary and temporary, improvised to meet the exigencies of the occasion which called it into being. As the revolution was no longer a mere policy of resistance ready to be abandoned when the British crown and parliament should yield to the demands of the colonies, but was to be prosecuted until independence should be recognized, a permanent organization must be substituted in the place of the one which had hitherto served to represent the people and to form the channel through which their national will was expressed. In the construction of this new government the separate state power triumphed over the national idea. Yet the latter was not entirely abandoned, nor was it, in fact, formally renounced. The people still remained one. They alone could decree their own destruction, and such a suicidal act can never be established by implication; of all others it needs positive, direct proof.

Still it is true that in arranging the new Confederation, in allotting powers and functions to its government, the supremacy was conceded to the states, while the national authority was placed in a position of actual subordination. The states were assumed as the sources of power; they were represented as severally existing and as delegating a small portion of their attributes to the central agent, while they reserved a much larger share to themselves. But even in the midst of this partial abandonment of the idea with which the revolution was commenced, the general body politic was not stripped of all its insignia of nationality. It was still left as the only political society which could hold intercourse with other sovereignties, which was admitted into the family of nations.

§ 59. On the 15th of November, 1777, Articles of Confederation, which from time to time had been discussed in the Continental Congress, were finally passed by that body and recommended to the several states for adoption. The states slowly followed the advice of Congress. All had ratified the instrument in 1778, except Delaware and Maryland. Delaware yielded in 1779, and Maryland in 1781.

§ 60. A recent writer describes the nature of the Confederation and the influences which led to it, in the following manner:<sup>1</sup> "It is true, however, that this principle of one nationality thus embodied in our Declaration of Independence, was not clearly and consciously before the mind of the country at the time that declaration was made. The Union which was thus constituted was generally understood to be chiefly for mutual defence, which left the question between one or many sovereignties to be finally determined by future contingencies. Neither was it plain even to the national men of that day, either how much, or what sort of union was necessary to constitute a national government. Clear and adequate conceptions of what they were dimly striving to realize could not come in a moment, could not be other than the growth of years of effort. Also, the colonial, now the state, government were first in the field, in full organization and activity, with already more than a century of growth and consolidation, and they were intensely jealous of each other.

§ 61. "From these causes it resulted that the state governments, seduced by the charms of separate independence and nationality, immediately *assumed* to exercise all those sovereign powers which had been reclaimed from the crown of Great Britain by an act of the people of all the states in the Union. And this assumption, although it was not so understood at the time, was, in its true character, an usurpation. . . . Here we see that state sovereignty on this continent had its birth in a palpable usurpation, which has never been formally sanctioned by the people of a single state, much less by the people of all the states, which would have been necessary, after the Declaration of Independence, to legitimate it in any one of them.

§ 62. "Having in this manner possessed themselves of sovereign powers, the states proceeded to delegate a portion of them to a confederated government under the celebrated Articles of Confederation. And here again we find the logic of usurpation ruling the whole procedure. For the states

<sup>1</sup> See the *Princeton Review* for October 1861, p. 615. The article is from the pen of J. H. McIlvaine, D. D., Prof. of Polit. Science, Coll. of N. J.

had no right, upon any theory of popular government, to form that Confederation. Whatever sovereign powers they now possessed they claimed at least to hold from the people, whose acquiescence in what, as we have seen, was at first an usurpation, did give it an informal validity. No other claim would have been tolerated for a moment. But it is evident that no government holding from the people, can have any right to alienate its sovereign powers in order to form another government. The powers which a government holds in trust from the people, it can have no right to resign into any other hands except those of the people themselves. The states had no more right to cede away the least of their sovereign powers, in order to form another government for the United States, than they had to abdicate the whole in favor of the British crown. The adoption of the Articles of Confederation by the states was an act of irresponsible power in the same line of procedure by which that power had been at first acquired.

§ 63. "The necessity for union, and the pressure of the national principle as embodied in the Declaration of Independence, were so strong that the Articles of Confederation could not represent simply and purely the idea of state sovereignty; and a very cursory examination of these articles in the light of contemporary discussions, reveals the fact that they recognize both of these hostile principles limiting, and, to a certain extent, neutralizing each other. In certain provisions it seems impossible not to recognize a decided representation of the principle of one nationality, and by no means a feeble tentative toward the formation of a national government. This attempt, however, was frustrated by the number and extent of the sovereign powers claimed as reserved to themselves by the states, and by them prohibited to the Confederacy; in which the principle of state sovereignty was represented as predominant."

§ 64. An examination of the most important features of the Articles of Confederation, will clearly show that the foregoing language is entirely correct. I shall first present a short abstract of the whole instrument, and shall then describe the general character of the government which it constitutes, and

ascertain and unfold the ideas which were embodied in this political fabric. This review will be of great assistance in the study of the present Constitution. Nothing can better indicate the nature of the existing organic law than the sharp contrasts between it and the Articles of Confederation.

§ 65. The Articles themselves purport to be made by the "Delegates of the United States of America in Congress assembled," and to be ratified by the delegates in virtue of power and authority for that purpose specially conferred upon them by the state legislatures, and are entitled "Articles of Confederation and Perpetual Union between the States." The instrument establishes the following fundamental rules and stipulations for the government of the federation:—

1. That its name shall be the United States of America.

2. That each state retains its sovereignty and power which is not by this Confederation expressly delegated to the United States in Congress assembled.

3. That the states severally enter into a firm league of friendship with each other for their common defence and welfare.

4. That the free inhabitants of each state shall be entitled to all the privileges of free citizens in the several states; that no citizen of one state shall be subject to any restrictions upon trade and commerce in any other state which are not also imposed upon the citizens of the latter; that no duties shall be laid by any state upon the property of the United States; that fugitives from justice shall be given up, and full faith given to the records and judicial proceedings of every state.

5. That a congress of delegates shall be established in the following manner: Each year, every state shall appoint and maintain, in whatever manner it shall please, not less than two nor more than seven delegates, who shall meet yearly; but, in the congress thus constituted, each state shall be entitled to but one vote.

6. That no state, without the consent of the United States in Congress assembled, shall send or receive any ambassador; nor make any treaty with a foreign nation or with another state; nor lay any duty or impost which will interfere with

stipulations contained in treaties entered into by the United States in Congress assembled ; nor, in time of peace, keep up any vessels of war or bodies of troops, except its own militia ; nor engage in war, unless invaded ; nor fit out privateers, except after a declaration of war by the United States in Congress assembled.

7. That, when troops are raised by any state for the common defence, all officers of and under the rank of colonel shall be appointed by that state.

8. That all common expenses shall be defrayed out of a common treasury, to be supplied by the states in proportion to the amount of private lands in each ; but the levying and collecting taxes to pay their proportions are to be entirely under the control of the legislatures of the states.

9. That the powers of the United States in Congress assembled shall be as follows : To declare war and make peace ; to send and receive ambassadors ; to make treaties, under the restriction that no treaty shall be made destroying the right of a state to lay imposts and duties ; to establish rules for the disposition of captures and prizes made in war ; to appoint final courts of appeal in prize causes ; to decide, on appeal, all controversies between two or more states, in a manner particularly defined ; to regulate the value of all coin struck by the United States or by the respective states ; to regulate the standard of weights and measures ; to establish and regulate post-offices ; to appoint all officers of the land forces in the service of the United States, excepting regimental officers, and all officers of the naval forces ; to make rules for the government of these forces ; to appoint a member of Congress president of that body ; to ascertain the sum of money necessary for the expenses of the United States, and appropriate the same when received ; to borrow money ; to build and equip a navy ; to agree upon the number of land forces needed, and to make requisitions upon each state for its quota of such forces, which quotas are then to be raised and furnished by the respective states.

A concurring vote of nine states in Congress assembled was made necessary to enable that body to engage in war,

grant letters-of-marque, make treaties, coin or regulate the value of money, ascertain the sums of money necessary for the public expense, emit bills, borrow money, appropriate money, create or increase a navy, raise land forces, or appoint a commander-in-chief. All other measures, except adjourning for want of a quorum, required a concurring vote of a majority of the states in Congress assembled.

Articles 10, 11, and 12 are unimportant.

The final article was as follows : Each state shall abide by the determination of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the articles of confederation shall be inviolably observed by the several states, and the Union shall be perpetual ; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.

§ 66. Such, in substance, was the fundamental law of the Confederation. But I have used an incorrect term. This was in no respect a law ; it had none of the essential elements of law. It was not enacted by the supreme power in the state ; it was not cast in the form of a command, nor did it confer on the government which it constituted any power to utter a command ; it imposed no legal duties ; it contained no sanctions by which obedience could be compelled. It was rather in its nature a treaty, to be observed as long as the contracting powers saw fit to yield to its requirements, and no farther. In truth, it was disregarded from the very beginning, and at last became a mere dead letter, with capacity only to hinder and thwart all attempts at development, to destroy all national and individual prosperity.

Some salient points in this constitution and government clearly indicate its character, and reveal the ideas which were controlling in its formation. We may profitably notice these points, and pass by the minor details which were contrived to make the plan effective.

§ 67. I. The first important and distinctive feature to be noticed is the entire absence of any formal recognition of, or



reference to, the existence of a nation. The People of the United States are not once mentioned; the presence and supreme attributes of that organic aggregate are completely ignored; no power is represented as derived from them, and none as conferred upon them; for even the slender concessions made by the states are not granted to the People, nor even to the United States as a political society distinct from its government, but only to the United States as represented by its government, — to the “United States in Congress assembled.” As a consequence, there is no *status* of United States citizenship created or recognized; we have free inhabitants and citizens of the respective states, but no citizen of the United States.

§ 68. The formative elements which were combined in this political structure were not individuals, but were the sovereign, independent states, united in a friendly league for their mutual defense and welfare; and all powers not expressly delegated to the Congress were declared to be reserved by the several states to themselves. Here we perceive that the national idea had been tacitly abandoned, or, at least, totally lost sight of. The People who revolted, and who, through their delegates, had announced to the world their own independence and sovereignty, had no part nor voice in this new creation. They never adopted it by any formal act. It was not even the work of their delegates. Nay, the people of the respective states were not its direct authors; but the legislatures of these commonwealths assumed the power thus to restrain the sovereignty of their own constituents.

It is plain that, upon the extreme States'-Right theory even, this assumption was a palpable usurpation. No legislature is so supreme that it can, without direct authority, cede away the inherent political attributes and organic social existence of the body-politic it represents. But the jealousies of the state politicians, and the local rivalries fostered by them, had temporarily blinded the people and their public servants to their true interests, and to the rightful claims of the nation. If some pure patriots perceived the real position of affairs, and attempted to impress upon their countrymen the national

ideas, their voices were drowned in the clamors of state partisans, and their arguments and warnings were powerless against state pride and prejudice.

§ 69. II. The second feature to be noticed is, that the few powers possessed by the United States were not directed against individuals, but against communities, against the respective states. Congress could not take money from the people by means of taxation; it could only direct the states to act. Congress could not enlist a soldier; it could only determine the number of troops needed for the common defence, and request the states to furnish their respective amounts. And, if we go through the whole range of its legislative and executive functions, we shall find the same principle at work, — a government acting upon independent states considered as separate, organized, political societies, and not upon the single individuals whose aggregates compose those societies.

There is no more important and distinctive element than this in the whole scheme of the confederated government, — nothing in which it contrasts more strongly with the present Constitution. For herein lies the very essence of the States'-Right theory; herein was distinctly embodied the claim of the states to paramount sovereignty. This was the crowning feature of the old Confederation, the perfected result of those notions which had then obtained the supremacy, and the conceded cause of all the disastrous and miserable consequences which followed from ill-considered and self-destructive organization. And, finally, this feature was entirely abandoned, and the government restored to its true basis, by the convention which framed, and the people who adopted, the present Constitution.

§ 70. III. The third point to be noticed is, that the United States government possessed, absolutely, no authority to enforce any of its enactments, to compel obedience to any of its laws. In fact, it could only recommend, it could not command. It was left entirely to the option of the respective states, whether or not any of the congressional requisitions upon them should be observed. The government was without any coercive means of raising even the smallest amount

of money. If it was fortunate enough to borrow, it could offer no assurance of an ability to pay. It could lay no duties on imports or exports, levy and collect no taxes, command none of the resources for maintaining the common defence or promoting the common welfare. This inability to raise money by any authoritative measures, was the essential element of weakness, which made it a government in name only, a mere solemn sham, and exposed it to the ridicule of its own people and of foreign nations.

§ 71. Again, the Congress was the sole organ of the government. No independent executive was constituted to direct the national affairs; no independent judiciary was authorized to expound the provisions of the compact and determine the functions of the central and the state legislatures. Congress might, indeed, prescribe regulations for the disposition of prizes and captures taken in war, but could give these rules no sanction. It could create final courts of appeal in prize causes, but the decisions of these tribunals were mere nullities, for there was no executive arm to enforce them. The legislatures and courts of the respective states retained the substantial power, and this they constantly used with hardly a thought or notice of the shadowy attributes conferred upon the general government.

§ 72. IV. The last general feature to be noticed is, the limited extent of the nominal powers granted to the United States Congress. Most of these had reference to the prosecution of war. The Articles of Confederation, in a very great measure, relate to a state of hostilities. The condition of peace, and the ordinary operations of government in seasons of tranquillity, are barely alluded to; all this was left to the local commonwealths. Congress might regulate the value of coin; might, together with the states, coin money; might fix the standard of weights and measures; might establish post-offices; and this brief enumeration exhausts the list of those powers which have reference to internal affairs, unconnected with war. In the foreign relations its functions were nominally unlimited, for it might declare war, make treaties, send and receive ambassadors. But these concessions were prac-

tically nugatory, for it could neither raise troops to fill its armies, or money to pay them; nor could it procure the stipulations of its treaties to be observed, for the courts of the thirteen states were supreme in expounding, and the legislatures in carrying out, the provisions of these international compacts.

§ 73. Such was the government of the United States during the Confederation, a name without a body, a shadow without a substance. The consequences of this plan of government upon the material prosperity of the people, upon the development of the states and the Union in all that constitutes national greatness, upon the estimate in which the country was held by foreign powers, were such as might have been anticipated from a political organization contrived in utter disregard of all the lessons of history, and in complete opposition to all true principles of civil polity.

§ 74. These consequences are very accurately described by the writer quoted above.<sup>1</sup> “The history of the Confederation during the twelve years beyond which it was not able to maintain itself, is the history of the utter prostration, throughout the whole country, of every public and private interest,—of that which was, beyond all comparison, the most trying period of our national and social life. For it was the extreme weakness of the confederate government, if such it could be called, which caused the war of independence to drag its slow length along through seven dreary years, and which, but for a providential concurrence of circumstances in Europe, must have prevented it from reaching any other than a disastrous conclusion. When, at last, peace was proclaimed, the confederate congress had dwindled down to a feeble junto of about twenty persons, which was so degraded and demoralized, that its decisions were hardly more respected than those of any voluntary and irresponsible association. The treaties which the Confederation had made with foreign powers, it was forced to see violated, and treated with contempt by its own members; which brought upon it distrust from its friends, and scorn from its enemies. It had no standing among the nations

<sup>1</sup> *Princeton Review*, October, 1861, pp. 618, 619.

of the world, because it had no power to secure the faith of its national obligations. For want of an uniform system of duties and imposts, and by conflicting commercial regulations in the different states, the commerce of the whole country was prostrated and well-nigh ruined. Private indebtedness was almost universal, and there was no business or industry to provide for its liquidation. Bankruptcy and distress were the rule rather than the exception. The government was loaded with an enormous debt, and had no authority to provide for the payment of either principal or interest, whence its credit was paralyzed. The currency of the country had hardly a nominal value."

§ 75. "The states themselves were objects of jealous hostility to each other. The mouth and lower waters of the Mississippi were controlled by Spain, who prohibited their navigation; and whilst the Eastern States were urgent that her claims should be acknowledged for the sake of advantages to their commerce, the whole Western valley, with its dependencies, was on the verge of separation from the East, in order to maintain, at all hazards, the rights of way to the ocean on that father of floods. The internal peace of the country was threatened, and a civil war seemed inevitable from the discontent of the officers of the revolution, for whose sacrifices and necessities Congress, in open breach of the public faith, yet from sheer inability, had failed to make any compensation or provision. Nothing but the personal influence of Washington over the officers themselves averted this calamity. In some of the states rebellion was already raising its horrid front, threatening the overthrow of all regular government and the inauguration of universal anarchy. It is difficult for us to conceive of the panic which Shay's rebellion in Massachusetts spread throughout the country, and of the peril to which the whole fabric of society was exposed from organized bands of ten or fifteen thousand armed men bent on cancelling, at the point of the bayonet, all public and private indebtedness, and excited to madness with lust of plunder. Ah! what a picture of general gloom and distress, of patriot anguish and despair, is presented in the contemporary history of the confederate government."

## SECTION III.

PROCEEDINGS WHICH DIRECTLY LED TO THE ADOPTION OF THE  
CONSTITUTION.

§ 76. The alarming results of the policy which had, for a while, abandoned the idea of one nationality, and taken up that of independent state sovereignty, were producing their legitimate effects upon the people. It was seen that something must be done, and that at once; for the wheels of government had actually stopped, and society would ere long become disintegrated. What to do, what measures to adopt, was as yet involved in doubt and dispute. An amendment to the Articles of Confederation, which, it will be remembered, would require the assent of Congress and of the legislature of every state, was at first suggested. The public acts of Congress and of the various legislatures at the time, point to this remedy; show conclusively that those who managed the public affairs were prepared to take no further step than the mere reforming and enlarging the existing government. This fact is important to be noticed; for it is, in many respects, the key to the subsequent action of the constitutional convention and of the people.

§ 77. Let us take a rapid review of the proceedings of the various legislative bodies, which terminated in the ratification of the present Constitution.

On the 21st of January, 1786, the legislature of Virginia adopted a resolution and appointed commissioners "who were to meet such as might be appointed by the other states of the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far a uniform system in their commercial relations may be necessary to their common interest, and their permanent harmony; and to report to the several states such an act relative to this great object, as, when unanimously ratified by them, will ena-

ble the United States, in Congress assembled, effectually to provide for the same."<sup>1</sup>

Four states only, New York, New Jersey, Pennsylvania, and Delaware, responded to this call; and their delegates, together with those of Virginia, met at Annapolis in September, 1786. Deeming their numbers too small, and their powers too limited for any permanent good, they separated after making a report to the several states and to Congress, in which they recommend that the states should appoint commissioners, "to meet at Philadelphia on the second Monday of May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every state, will effectually provide for the same."<sup>2</sup>

§ 78. After some delay, Congress acted upon this suggestion, and on the 21st day of February, 1787, passed a resolution, wherein, after reciting the power given in the Articles of Confederation to amend the same, and the existence of defects demanding a remedy, they recommend that "a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union."<sup>3</sup>

§ 79. The Convention thus recommended by Congress met at the time and place appointed, and was composed of delegates from twelve states. Rhode Island alone refused to be represented.

<sup>1</sup> See *Elliot's Debates*, Vol. 1, p. 115.

<sup>2</sup> *Ibid.* pp. 116-118.

<sup>3</sup> *Ibid.* pp. 119, 120.

This Convention proceeded to do, and did accomplish, what they were not authorized to do by the resolution of Congress that called them together. That resolution plainly contemplated amendments to the Articles of Confederation, to be submitted to and passed by the Congress, and afterwards ratified by all the state legislatures, in the manner pointed out by the existing organic law. But the Convention soon became convinced that any amendments were powerless to effect a cure; that the disease was too deeply seated to be reached by such tentative means. They saw that the system they were called to improve must be totally abandoned, and that the national idea must be reëstablished at the centre of their political society.

§ 80. It was objected by some members, that they had no power, no authority, to construct a new government. They certainly had no authority, if their decisions were to be final; and no authority whatever, under the Articles of Confederation, to adopt the course they did. But they knew that their labors were only to be suggestions; and that they as well as any private individuals, and any private individuals as well as they, had a right to propose a plan of government to the people for their adoption. They were, in fact, a mere assemblage of private citizens, and their work had no more binding sanction than a constitution drafted by Mr. Hamilton, in his office, would have had. The people, by their expressed will, transformed this suggestion, this proposal, into an organic law, and the people might have done the same with a constitution submitted to them by a single citizen. This point, that the Convention had no authority for the work they actually did, that they were mere volunteers, is one of great importance, and has not received the attention it deserves from those writers who have expounded the fundamental law.

§ 81. On the 17th of September, 1787, the Convention completed their labors, laid the proposed Constitution before Congress, and advised "that it should be submitted to a convention of delegates chosen in each state by the people thereof, under a recommendation of its legislature, for their



assent and ratification.”<sup>1</sup> The Constitution itself provided that, when ratified by at least nine states, it should become established in the states so ratifying the same.<sup>2</sup>

The Convention also enforced their recommendation by a letter addressed to Congress and through them to the country, from which some extracts will be interesting. “In all our deliberations we kept steadily in our view that which appears to us the greatest interest of every true American, — the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the Convention to be less rigid, on points of inferior magnitude, than might have been otherwise expected; and thus, the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.”

§ 82. What was the real meaning of all these proceedings?

The Convention knew that they were not amending the Articles of Confederation; for in that case the proposed alterations must be submitted to Congress, and then to the state legislatures, and approved by all; but in no instance would any direct reference to the people be necessary. They knew, on the contrary, that they were proposing a new government, and that in creating this government, neither they, nor Congress, nor the legislatures of the states, had the slightest power, the smallest voice; that such a creation was the work of the people alone, of the nation in its imperial capacity, by virtue of imperial powers which existed in them indissoluble and incommunicable, above and beyond all existing forms, all congresses, legislatures, and state organizations. To the people, then, they appealed. But the people could only express their will by voting, and to vote requires some organized method. The Convention itself could not provide means for taking, ascertaining, and publishing this vote, for they were, in fact, a mere body of volunteers, without any power except

<sup>1</sup> Resolution of Convention, *Elliot's Debates*, Vol. 1, p. 16.

<sup>2</sup> Constitution, Art. VII.

that moral influence which knowledge and worth always give. Nor could Congress make the provision, for this was an emergency which the Articles of Confederation had not anticipated; any attempt of Congress to submit the proposed plan to the people, would have been without warrant, a mere nullity. The state governments were the only bodies which possessed the requisite ability to call upon the people, duly and in order to register their supreme and sovereign decree in reference to the question before them, and thus to render the popular act legal in form as well as in substance. Therefore the Constitution was handed over to the various state legislatures as mere depositaries and agents, for them to submit to the people. Were this to be done in our own time, the submission would doubtless be direct; but ideas of popular government were not quite so advanced at the close of the last century as they are in our own day; and the only act of the people deemed possible was that of delegating their powers to special representatives who should meet and ratify the instrument in their name. This was the proceeding advised by the framers of the Constitution and followed by the state authorities. All were acting merely as the channels, the mechanical means, to ascertain, convey, and publish the will of the real nation.

§ 83. While the Constitution was before the people awaiting their approval, the friends and partisans of the state-sovereignty theory marshalled their forces and attacked it with a virulence and malignity of which we can now hardly form a conception. They understood the effect of the change; they knew that local power was slipping away from them, and that local pride must be humbled before the majesty of the nation. But they felt that it would be unsafe to discuss the question of ratification from this standpoint alone, and therefore assailed the government as a mere scheme of tyranny. They declared that it would be destructive of all liberty. They pronounced the Executive to be worse than an absolute monarch, and predicted that he would soon be able to usurp all power, and to reign for life, without the aid of Congress and without reference to the people. These attacks called forth from the pens of Hamilton, Madison, and Jay, a series of letters since known

as *The Federalist*, which exerted a most powerful influence in producing the final result, and which have been, and will remain, an authority to the courts, and a text-book to political students, one of the most complete and profound expositions of the science of government that has ever appeared.

§ 84. Conventions in eleven states having ratified the Constitution,<sup>1</sup> Congress, on the 13th of September, 1788, took measures for the election of officers, and on the 4th of March, 1789, the present government commenced the exercise of its functions. North Carolina did not ratify until the 21st of November, 1789,<sup>2</sup> and Rhode Island until the 29th of May, 1790.<sup>3</sup>

Having thus sketched the external history of the adoption of our Constitution, and examined the nature of the various acts which preceded that event, to the end that the true national character of the political society and of its organic law might be discovered, I shall, in the following chapter, interrogate the instrument itself with the same intent.

<sup>1</sup> See the official ratifications of the several states, *Elliot's Debates*, Vol. 1, pp. 319-331.

<sup>2</sup> *Elliot's Debates*, Vol. 1, p. 333.

<sup>3</sup> *Ibid.* p. 334.

## CHAPTER III.

### THE NATIONAL ATTRIBUTES INVOLVED IN THE PROVISIONS OF THE CONSTITUTION.

#### SECTION I.

##### DISTINCTION BETWEEN THE GOVERNMENT AND THE NATION.

§ 85. IN the preceding chapter I have spoken of those grand salient facts in the history of our people which seem to stamp a distinctive character upon our political society, — the combined revolt, the united declaration of independence, the subsequent receding from the high ground of nationality during the short and disastrous period of the Confederation, and the final return to the early and true idea of unity and nationality by the voluntary act of the people in pushing aside the crumbling fabric of government built on the foundation of state sovereignty, and adopting one emanating directly from themselves, as the expression of their organic will. We are now prepared to interrogate the Constitution itself, and to discover if the answers which it shall return accord with the principles and doctrines contained in the facts of our history.

§ 86. It is natural to expect that the work will represent, in some measure, the condition and thought of the artificer; and if the one people of these United States are the authors of an organic law, we may well ask if they have left any trace of their oneness and nationality in the product of their sovereign political action.

But here it is necessary to repeat and elaborate a general doctrine which has already been dwelt upon with some emphasis, and which must be constantly recalled to mind through the whole course of the present inquiry as the solution of many a difficulty and apparent contradiction. This truth is, the

absolute and necessary distinction between the nation which is the source of political power, and the government which is the creature of that power, established to act, in certain cases, instead of, or as the agent of, that nation.

§ 87. We affirm that the People of these United States are the nation, possessed of supreme powers, and that the government of the United States is their creature and agent. All those theorists who deny the original and essential unity and nationality of this people, declare that the separate states are or were the original nations. As a consequence it is either expressly maintained, or tacitly assumed, that there is no United States apart from the limited government created by the Constitution; in a word, that the United States, and the government thereof, which we recognize as distinct, are one and the same existence. In this short sentence are summed up the differences between the advocates of nationality, and those of state sovereignty. If we fail to apprehend the truth of the doctrine which I have stated, we shall fail to obtain any adequate conception of the imperial character of the people as an organic political society.

§ 88. Nor is the thought peculiar to our own social condition; it is a dogma which lies at the basis of all political science. The French nation has continued one and the same, while its government has taken the successive forms of Monarchy, Republic, Empire, Monarchy, Republic, and Empire, again. These several forms were, for the time being, the recognized organs and channels for the utterance and execution of the organic will of the people, in whom alone, as the final source, reside all the attributes and functions of legislation.

The English people remained one nation through the whole gradual but grand progress of constitutional change and development, from the time of the earliest Norman kings down to the temporary overthrow of the monarchy under Cromwell, to its unqualified restoration in the persons of the second Charles and the second James, to its subsequent limitation on the accession of William of Orange, and to its present existence as a splendid but empty pageant.

The people, the nation, live on, subject only to destruction by overwhelming force or by the gradual decay of race life; the governments come and go, with no inherent qualities of their own, but only as the representatives of the nation's will.

§ 89. The powers which can be lawfully wielded by a government may range through an ascending scale, from those so feeble that the agent has hardly an appreciable existence, to those so complete that they express the entire sovereignty of the nation. (Over the form of its own government, a nation has an absolute control.) It may declare that no powers shall be given to delegated rulers; that itself shall deliberate, shall determine, act, and execute in every emergency; or, in other words, it may itself use all the sovereign authority which inheres in every nation, without the intervention of any constituted agents. It is evident, therefore, why a pure democracy must be the most terrible of tyrannies, because there is no check, no limit upon the exercise of authority; since the people, who are everywhere, and at all times, the source of power, and who, in other forms of political society, place some restraint upon the use of that power by themselves, now wield it to its full measure, with no organic law<sup>1</sup> compelling them, no guide but their own wish.

§ 90. On the other hand, the people, the nation, may clothe the government constituted by them with all the political attributes and functions which they themselves enjoy, and may thus remove the necessity of any direct formal interference by themselves to make changes in the organic law.<sup>1</sup> This, as it seems to me, is true in Great Britain. The government is Parliament, consisting of King, Lords, and Commons. This parliament is, in fact, omnipotent. The British Constitution is nothing more than the will of the people, not expressed by them directly in a written instrument or in any other positive manner, as in our own country, but expressed by and through the Parliament; and over this constitution the legislature has complete power to amend, alter, or destroy. When we talk

<sup>1</sup> It should be remarked that no form of government can prevent or destroy the extra-legal, or revolutionary capacity of the people to interfere.

or read of the constitutional rights of the British subject, we mean such rights as Parliament has conferred, or has suffered him to enjoy ; and the same body that bestowed may take away. Parliament deposed one king, and established a military rule under the name of the Protectorate ; declared that another king had abdicated, and presented the crown, under many restrictions, to a successor. Parliament might abolish Magna Charta, the Bill of Rights, the Habeas Corpus ; it is, as far as human government can be, omnipotent. That it has not exercised its full power ; that it is bound by traditions and the received law ; that it represents and acts for the people and not against their interests ; that it is, in a true sense, conservative and not destructive ; — are not denied as facts : but I am not speaking of what may probably, but of what may possibly, happen. The same government which abolished the disabilities of Roman Catholics, and admitted Jews to a seat in the House of Commons, may destroy the English Church as a temporal organization ; the same government which passed the Reform Bill in 1832, and thus accomplished what has been called a “ bloodless revolution,” may grant universal suffrage,<sup>1</sup> and at last dispense with royalty and privileged orders. I do not predict such changes in England ; I only say that should they ever come about, they may be effected by the existing government, in the regular course of administration, without an appeal to the people in their collective capacity as the final depositaries of all political powers.

§ 91. While, therefore, the people, the nation, is sovereign, and not the machinery which it has established in order that its power, or some portion thereof, may be regularly exerted ; and while this machinery may be arranged according to an infinite variety of plans, we cannot expect to find in the detail of these plans an unerring index of the character of the society which exists behind and superior to them. The nation may have so limited the attributes of the government as hardly to suggest the existence of a national authority ; or it may have

<sup>1</sup> The act lately passed by Parliament is certainly a long step toward universal suffrage, and it may not be rash to assume that before many years Parliament will complete the work thus begun.

so enlarged them, that the body politic is apparently lost in its own creation.

The government ordained and established in the Constitution of the United States is not to be ranked with either of these extremes. It is limited indeed. Very many legislative and administrative powers are withheld from it; but those conferred are national in their essence and in their extent; while the nationality of the body which created it, appears in characters too plain to be misunderstood. It should also be remembered that, at the time of the adoption of the Constitution, ideas of state sovereignty were very prevalent, and had for a time been generally accepted; and that, as the Constitution — that is, the form and functions of the government — was the result of a compromise between the advocates of two contending principles, we shall find in its provisions evident traces of the doctrine of separate state sovereignty. But this fact does not militate against our position; for, in truth, the whole organic law might have been framed so as to leave the administration of affairs entirely in the hands of the individual states, and yet have been the work of one sovereign body politic.

## SECTION II.

THE IMPORTANT AND DISTINCTIVE NATIONAL ELEMENTS IN THE CONSTITUTION ITSELF; IN THE ATTRIBUTES AND FUNCTIONS OF THE GOVERNMENT.

§ 92. The immediate subject upon which we are engaged, to wit: the independent and paramount sovereignty of the nation, which is the people of the United States, will be concluded by a brief reference to those portions of the organic law wherein that fact is either openly and directly expressed and declared, or tacitly admitted.

### 1. *The Preamble.*

§ 93. The Constitution opens with the grand announcement, confirming the result of our historical analysis, that this fundamental law, and the government created thereby, are the



work of the people of the United States, ordained and established by them and not by the several states; and as an inevitable consequence, that the powers conferred on this new-made government were not delegated by the states in any sovereign independent capacity of theirs, but by the people of the United States as a municipium or nation.

“ We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

§ 94. (Here is the calm, sublime statement of self-existence, of inherent and unlimited power, — a power of national and fundamental legislation for the purposes of protection to themselves as a body politic, and not to the states as separate political societies.) No amplification or argument can add force to this short and simple (expression of an organic will.) However much the states may have exercised usurped attributes of sovereignty during the unhappy Confederation; however much the conception of one people acting as an unit may have been forgotten or abandoned amid the jealousies and destructive rivalries of the commonwealths claiming substantial independence; the people had now arisen, reasserted the original idea, repudiated the assumptions of local supremacy, and uttered their organic will in terms which we hope will have a meaning and a power to the end of time. This is the rock upon which many of the great champions of nationality among American statesmen have planted themselves in their conflicts with opposing schools, and from which they were never dislodged by the fiercest assaults of extreme or moderate partisans of state sovereignty.

§ 95. Finally, this solemn preamble was understood to be so complete an answer to the claims of the separate commonwealths to any independent supremacy, that when the seceding southern states, asserting this claim, and basing their right to act thereon, met to frame a new constitution for their confederacy, they rejected the preamble set forth by their fathers,

and adopted one which reads as follows: "We, the people of the Confederate States, *each state acting in its sovereign and independent character*, in order to form a *permanent federal government*, establish justice, . . . do ordain and establish this constitution for the confederate states of America."<sup>1</sup> Thus have the opponents of our nationality, by their most solemn and deliberate acts, conceded the correctness of the construction which has been placed upon this utterance of the sovereign people of the United States.

## 2. *The Enacting Clauses.*

§ 96. If we pass from this preamble or preface, to the substantial grants of power contained in the Constitution itself, we shall find equally strong evidence of nationality in the essential character of these powers. It must be remembered, however, that it is not the form but the attributes of the government, that testify as to the nature of the political society which creates it, and over which it dominates. There is nothing in the threefold division into Executive, Legislative, and Judicial departments, which necessarily implies the existence of sovereignty. The government of each state, and of many cities, is formed upon the same model. It is the jurisdiction of these several departments—that which they may lawfully do, or that from which they are bound to forbear—which stamps their authors as sovereign or subordinate.

§ 97. It is a maxim of political as well as of private law, that an agent cannot hold and exercise functions transcending those possessed by the principal who appoints him and authorizes him to act. The powers he enjoys may be less in extent and fewer in number than those which inhere in that principal, but they cannot be greater or more numerous. When, therefore, we find the government of the United States clothed with functions which the several states have never possessed, either before or since the Declaration of Independence, we may infer without hesitation, that such functions were not derived from them.

We are now prepared to examine some of the most impor-

<sup>1</sup> See *Appleton's Ann. Am. Cyclo. for 1861*, p. 158.

tant of these features of the Constitution and attributes of the government which testify to the nationality of the one body politic, and against any assumed sovereignty of the several commonwealths.

§ 98. I. *The Declaration of Supremacy.* — First and foremost: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."<sup>1</sup>

What is the full import of this often-quoted declaration? It means that so far as the people of the United States, the nation, have seen fit to delegate a portion of their own inherent powers of legislation and government to their appointed rulers, just so far those appointed rulers are supreme throughout the land in the exercise of those delegated powers. (It confers an absolute supremacy upon the general government, commensurate with the capacities which are granted at all.) It also recognizes and proceeds upon the truth that the political society which assumed thus to transfer legislative and administrative functions to its creature, had the right to make such a transfer, — in a word, had inherent and absolute sovereignty in itself.

§ 99. It should be noticed also that this affixing the character of absolute supremacy to the laws of the United States, made in pursuance of the Constitution, is not confined to the direct legislation of Congress. According to the political organization which we have in common with England, a portion only of the actual law-making is done by the Congress or the legislature. The courts are also possessed of a function not only to expound and apply rules already known and recognized, but in reality to enact others whenever a proper occasion may arise in the decision of cases before them. A very large part of the law which regulates the affairs of business and the private rights of persons, has never received the sanc-

<sup>1</sup> Constitution, Art. VI. § 2.

tion of the legislature, but has found its sources and authors in the independent judiciary.<sup>1</sup>) The judgments of the United States courts, expounding a statute, construing the Constitution, or adding a new rule to the vast body of judicial legislation within their especial jurisdiction, are as much laws of the United States as the formal acts which have been passed by Congress and have received the assent of the President. The character of supremacy belongs to all these; the language of the (Constitution is general, and includes every form and species of legislation which can exert a binding force upon the citizen.) This is a truth which most writers have either entirely overlooked, or have failed to consider with the care that its importance demands.

§ 100. *Interpretation of the Tenth Article of the Amendments.* — The force of the constitutional provision which we are considering (Art. VI. § 2), is not at all weakened by the tenth article of the Amendments, when the latter is correctly read and understood. This amendment is in the following words: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” That a true construction may be put upon this amendment, it should be read in connection with the one which immediately precedes it, and which was adopted at the same time, as follows: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”<sup>2</sup>

§ 101. The tenth article just quoted is often assumed to be a clear recognition of the former sovereignty of the separate states; but nothing can be more unfounded and fallacious than this claim. Those who insist upon this meaning must alter

<sup>1</sup> See Pomeroy's *Introduction to Municipal Law*, Part I. chap. iii., where this subject of judicial legislation is considered at large.

See also Austin's *Province of Jurisprudence*, Vol. 2, Lects. XXXVII. and XXXVIII., in which the character of judicial decision *as law* is demonstrated, its peculiarities explained, and its merits and demerits, as compared with statute law, are set forth. The theory of Blackstone, that courts only declare what has always been law, and do not create, is conclusively shown to be not only false, but absurd.

<sup>2</sup> Ninth Art. of the Amendments.

the language, and read it as though the reservation of powers were made *by* the states and not *to* them. The clause should be compared with the second of the Articles of Confederation, which reads: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not expressly delegated," &c. The change of prepositions in the tenth amendment would apparently be a slight one, but it would be mighty in import and results. Powers are said to be reserved; and it is plain enough to whom the reservation is made, — to the states and to the people. This provision, however, does not tell us by whom the reservation is made; that fact must be gathered from the history of the nation, from the whole tenor of the Constitution, from its entire scope and design, and from its preamble. The body which conferred portions of its powers upon the government which it had created, is alone capable of reserving the residuum to itself, or to any other body. This single political society which confers and which reserves is the people of the United States, the nation itself. By reading the two amendments together, this meaning is made plain. The ninth article speaks of rights retained *by* the people; the tenth, of powers reserved *to* the states. The former recognizes the people as the one source of all power, as they could not retain what they were not before possessed of; the latter speaks of some powers which had not been conferred by the people on its general government, as allotted to the states. The former points out the giver; the latter, the recipients.

I remark, in passing, that the term "United States," in the tenth amendment, plainly describes the government established by the Constitution, and not the political society which lies back of that organic law, and which was its author. The same term is often applied to both these subjects, although the Constitution generally uses the word "people" to designate the latter.

§ 102. II. *The Status of Citizenship.* — The Constitution recognizes our nationality by assuming that the *status* of citizenship, and the consequent duty of allegiance, *exist independently of that instrument.* In this, the present organic law is in

bold contrast with the Articles of Confederation. Were our government a mere federation of equal, sovereign states, united for certain purposes of administration, there could be no real nation and no citizenship. The *status* of the citizen had been clearly defined, and the word had attained a definite meaning, long before our fathers employed it in the Constitution. It implies a political society, — a nation, — of which the individual is a member, to which he owes allegiance, and which is bound to give him protection. Now, it is to be observed that, while the Constitution nowhere in terms defines the *status* of citizenship, or declares what persons shall be admitted thereto, it does assume its existence, and provide for all the consequences that flow from the relation; the general government has exclusive power to admit persons of foreign birth to that condition; while the article in relation to treason<sup>1</sup> recognizes the duty of allegiance, for the essence of the crime of treason is the violation of allegiance. The word "allegiance" is fruitful in meaning. Etymologically it is the binding of the citizen by a chain of duty to the body-politic of which he is a member. It therefore implies a nation and his own membership thereof. Senator Mason, of Virginia, and other partisans of state sovereignty, were strictly logical in asserting that they owed allegiance only to their own commonwealth, and not to the United States.

§ 108. III. *The Proprietorship of Public Lands.* — The Constitution recognizes our nationality in providing for the ownership by the United States of all new, unappropriated public lands within the borders of the states and territories.<sup>2</sup> The King of Great Britain is said to be the ultimate owner of the soil, and is the proprietor of all the domain not allotted to private holders. The United States succeed to his title. During the Confederation, while the idea of nationality was obscured, the states separately ceded to the general government whatever title had been claimed by either of them to all unappropriated Western lands, and only retained the proprietorship of that within their immediate territorial limits. This title has been continued, and has been extended over all sub-

<sup>1</sup> Art. III. Sec. III.

<sup>2</sup> Art. IV. Sec. III. § 2.

sequent acquisitions by purchase or conquest. Nor does the ownership pass from the United States, and vest in a particular state, when the latter becomes organized as a separate commonwealth, throws off its territorial character, and is admitted as a state into the Union; but the nation retains its property, and from it must all private purchasers derive their rights. This original and paramount dominion in the newly acquired soil which may be added to the territory of the country, is a high attribute of sovereignty, and indicates that the United States is an independent body-politic, and not a mere agent to carry on certain governmental acts.

§ 104. IV. *The Legislative Powers.* — The Constitution recognizes our nationality in the essential character of the legislative powers that are conferred upon Congress. It will be remembered that it is not the number, but the extent, of these powers which stamp them as national. The people have all powers; they may retain some dormant; they may delegate others to the general government; they may permit others to be exercised by the separate states. Now, it is evident that those which they have entrusted to their immediate agent — the general government, which represents the whole nation — are of a far higher class, more imbued with the essential attributes of sovereignty, than those which they have permitted to be exercised by the state governments, which represent local and partial communities. What are some of the more important of these powers which the Congress may wield and enforce against the individuals who compose the total aggregate?

§ 105. (Those which are held exclusively by the United States, or, in other words, which are denied to the separate states, are the following: ) The regulation of commerce; the admission to citizenship by naturalization; the coining of money; the establishment of post-offices; the granting of patent and copy rights; the declaring of war; the raising and support of armies and navies, and the government of the same. In addition, the Congress has unlimited power to lay taxes of all kinds, — some to the exclusion of the states, — as duties on imports; others in connection with the states; with the further

prerogative that the (taxing power of the general government is superior and paramount, and must first be satisfied before the local commonwealths can put into operation their subordinate function of taxation) Finally, the general government is to be the sole judge of what particular measures are fit, proper, and necessary in order to carry these general grants of power into practical execution. I have not here enumerated all of the legislative functions of the United States Congress, but only noticed those most important for the purposes of the present inquiry.

§ 106. The mere recital of these tells its own story. Can that political society possess any attribute of sovereignty, which is forbidden to wage offensive or defensive war, and thus to maintain its own existence; and which is unable to raise and support an army or navy; and which is deprived of the right to coin money; and which possesses no control over commerce; and which must exercise its power of taxation in subordination to another body-politic? To predicate sovereignty of commonwealths debarred from these functions, is to ignore the meaning of terms and the nature of attributes.

§ 107. V. *The Executive Powers.* — The Constitution recognizes our nationality in the essential nature of the powers conferred upon the Executive. He is the commander-in-chief of the forces of the United States, and, as such, has the entire, exclusive control and direction of war, after hostilities have been declared and armies and navies raised by Congress. He, with the advice and consent of the Senate, must enter into all treaties with foreign countries, and appoint all important officers in the general service. He holds intercourse with other nations through means of ambassadors. Finally, he is charged with the duty of executing all laws of the United States. These are attributes of independent sovereignty, capable of being conferred on an official only by the political society in which that sovereignty resides.

§ 108. VI. *The Judicial Powers.* — The Constitution recognizes our nationality in the essential character of the powers conferred upon its judiciary. Many of these are exclusively held by the courts of the nation, and are commensurate with



the legislative functions granted to the government. I need now refer but to a single one of the judicial powers, but that one is of the utmost importance. As the Supreme Court has jurisdiction in all cases arising under the Constitution, the laws of the United States, and treaties made under their authority, it follows that this tribunal is the final interpreter of the Constitution and of all laws and treaties made by the United States, and of all laws made by the several states so far as they conflict with the organic law ; and its decisions, forming a part of the great body of unwritten jurisprudence, are the supreme law of the land. State constitutions and laws, as well as acts of Congress, may be reviewed, questioned, condemned, and declared null and void by the national judiciary. No other court in the world is clothed with such functions.

§ 109. VII. Finally, the Constitution recognizes our nationality in providing means for the sovereign people to make amendments in their organic law. This power of amendment, when exercised in the appointed manner, is absolutely unlimited. Article V. explains the methods which must be followed by the people in availing themselves of this inherent and absolute control over the fundamental law. "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, as a part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Congress ; provided that no amendment which may be made prior to the year 1808, shall in any manner affect the first and fourth clauses in the ninth section of the first article ; and that no state without its consent shall be deprived of its equal suffrage in the Senate."

✓§ 110. Here is no limit upon the power of amendment, but only upon the modes in which that power shall be exerted. The proviso with which the article closes, plainly implies that

amendments may be adopted which oppose further and greater limitations upon the several states, than those under which they now hold certain restricted legislative functions. It may be remarked, in passing, that the first eleven articles of the amendments, which were adopted almost immediately after the establishment of the present government, are all restrictive of the powers of that government, while the last amendment abolishing slavery is restrictive of the powers of the states, and enlarges those of Congress.

Whatever was the political society that formed the Constitution and government for itself, may change that Constitution and government. This is a proposition self-evident. I need not repeat the reasons which have been already advanced to show that the one people of the United States, — the nation, — is the sole author of this scheme of organization.

§ 111. The people, if they were the original authors, may decree a revision. If, on the contrary, the separate states were the original creators, they alone can remodel their work, and no one of them can bind the others; each has only authority within its own jurisdiction; the very idea of sovereignty excludes any power in another body-politic to limit the functions of a state against its consent. We find, therefore, that those who have opposed particular amendments — as the one abolishing slavery — on the ground that they were beyond the authority of the people to make, have been compelled to place themselves on the dogma of state sovereignty, as the sole foundation and support of their position. But the Constitution in this very article recognizes the fact that states may be brought under the sanction and obligation of an amendment, without their assent, and even with their decided opposition; and thus another is added to the many features of our organic law, which are utterly inconsistent with any assumed sovereignty in the separate commonwealths. For, granting the correctness of the theory that the several states were once political sovereignties, and that each surrendered a portion of its inherent powers to the general government, such surrender would go no further than the express

provisions of the Constitution; as to all other matters not reached by that instrument, their sovereignty would remain intact. By this theory, then, it is entirely impossible that three fourths of the states can compel the remaining one fourth to give up a further portion of their attributes, contrary to their will.

§ 112. But our nationality does not need to be supported by arguments so apparently technical. It rests secure on the broad ground that the one people made, and they alone can unmake; that they reared the original structure, and have full power to enlarge and extend it. The capacities residing in them are boundless; their will, under God, is supreme; Constitutions and governments are their instruments and servants, not their masters.

§ 113. Nor is the force of this general truth weakened in the case of our own nation, by the carefully arranged formulas according to which the people must proceed to ascertain and record their sovereign will in any attempt at amendment. As all power originally and now resides in the one body politic, that society had, among others, the attribute of determining the means and methods by which alone it could effect, in an organized and lawful manner, a revision of its organic law; of marking out the channel through which alone its reconstructive force could be directed. Among a thousand different schemes it had an unlimited choice; and having once chosen it could declare that this selection was irrevocable except by revolution. For revolution is nothing but the people acting above and beyond the constituted order of things, in defiance of what has been considered law, but still in pursuance of inherent powers which they hold superior to law. I am, therefore, not speaking of the right of revolution, for that is not constitutional, but extra-constitutional.

§ 114. Our forefathers, when they adopted the present fundamental law, might have declared that amendments thereto should require only the assent of a majority of citizens entitled to suffrage; or should require absolute unanimity. They might, on the other hand, have committed the entire subject to Congress, and thus have made our government similar to

that of Great Britain in the omnipotence of its legislature. Of the motives which led them to the very choice they made, it is not necessary for us now to inquire. It is sufficient for our purpose that they chose a certain plan, while they might have adopted any other. •The form, therefore, which must be pursued, has nothing in it essential ; it does not modify, limit, or abridge the powers which can be wielded by and through that form. All the separate votes of Congress and state legislatures or conventions are but the machinery that was thought serviceable for ascertaining and publishing the popular will. If the Constitution had required absolute unanimity among voters, then any amendment might have been passed by unanimous consent ; if it had required only a majority of all voters, then any amendment might have been passed by such majority ; if the reconstructive power had been committed to Congress, as representatives of the people, then any amendment might have been passed by Congress. The fact that the people are now to be consulted, not in the aggregate, but as they are collected into local communities or commonwealths, does not affect this unlimited power of revision ; for there was nothing which *compelled* the adoption of this particular method, it was only chosen from motives of expediency.

§ 115. The result of this discussion is, that the People of the United States, by virtue of their inherent, absolute attributes as a nation, may, by following the order prescribed in the Constitution, adopt any amendments thereto, whether such changes would enlarge or diminish the functions of the general government, whether they would widen or contract the scope of state legislation. Nay, it is possible that the idea of local self-government, which underlies our present civil polity, might be entirely abandoned, and the plan of complete consolidation substituted in its stead ; even a monarchy might be reared in the place of the present republic. It is true that the people have placed an almost insurmountable obstacle to such action on their part, for they have required a species of unanimity as a prerequisite to a reconstruction which should destroy the states as distinctive elements in our political organ-

ization. "No state, without its consent, shall be deprived of its equal suffrage in the Senate." God forbid that the people should ever be led to give up the safeguard of the local commonwealths, the idea of local self-government which has been to England and to us the life of liberty. God forbid that the people should ever import the imperial policy of consolidation, which has made France the sport, now of a despot, now of a mob, at Paris. I have spoken, not of what is probable, but of what is possible.

√ § 116. *Legality of the amendment abolishing slavery.*—In the present connection it is proper to examine briefly the legality of the late amendment abolishing the *status* of slavery. While the measure was in the form of a proposal before Congress and the people, it was opposed on the ground that it was unconstitutional; that three fourths of the states could not make it binding upon the dissenting one fourth. Since its adoption, there has still remained a feeling in some portions of the country, there has still been expressed an opinion by certain public men and jurists, that it is a mere nullity. These facts furnish an ample reason for dwelling a moment upon the subject.

The amendment is as follows: "Article XIII. of the Amendments: Section I. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction. Section II. Congress shall have power to enforce this article by appropriate legislation."

§ 117. The most important objection to the legality of this additional article of the Constitution which has been urged by its opponents, will be found, when examined, to rest upon a denial of the national supremacy, and an assertion of state sovereignty. It is urged, with most logical accuracy of deduction from the assumed premises, that as each state is originally sovereign, its inherent attributes and capacity cannot be any further limited or restrained without its consent; and that as the Constitution is the work of the independent supreme states, the provision as to amendments must be confined to

changes in the detail of the organization, or at all events to such changes as do not interfere with the rights and powers of the local commonwealths.

I need not repeat the argument which has already been advanced against this entire theory. If the national theory be the correct one, this amendment is plainly within the power and capacity of Congress to propose and people to adopt.

§ 118. But certain opponents of the measure seem to have joined to their general denial of authority in the people, a special denial in this case, grounded upon the assumed peculiar character of the institution of slavery. They have urged that it is a *domestic* institution of the states, and is therefore beyond the reach of the nation even in the exercise of its reconstructive functions. Now it is true that all rights which flow directly from state legislation are in exactly the same sense domestic; and unless all such are absolutely secure from limitation and restraint by a constitutional amendment, there is no special element of domesticity in slavery which can protect it. Slavery derives its existence solely from state laws; so also do the rules which regulate the *status* of marriage, the ownership and descent of lands, the execution of wills, the administration of the estates of deceased persons, the jurisdiction of local tribunals, the creation of local corporations, the determination of what persons may vote for members of the lower House of Congress, and a thousand other rights, duties, and capacities. Do not all of these subjects rest upon the same foundation, and are they not all finally subordinate to the higher power of the one body politic? The lawfulness of an amendment cannot be doubted which would take away the present right of the states to prescribe the qualifications of congressional electors, and transfer the control over that matter to Congress. No one except a partisan of state sovereignty will deny that the people may withdraw from the separate commonwealths all power to create banks, and may commit the currency entirely to the care of the general government. If it were thought expedient, an amendment might plainly be adopted giving Congress the power to establish throughout the country uniform rules respecting marriage, the ownership and

descent of lands, the execution of wills, the administration of estates. Such a change would only introduce provisions of the same general character as that which now confers the right to establish uniform rules respecting bankruptcies, and many strong reasons of convenience could be urged in favor of the step. But marriage, ownership, succession, and the like, are as clearly domestic in their character as slavery; because they relate to individuals in their private, and not in their political capacities, and because they are at present regulated by state laws alone. Indeed, those who intelligently deny the power of the people to adopt the amendment abolishing slavery, must fall back upon the view which considers the separate states as originally and now sovereign communities, in whose policy and functions no change can be made without their own consent. The denial of power to amend would, therefore, extend to many other subjects besides the institution of slavery.

§ 119. I have now finished the first general division of the subject, and have answered the question proposed at the outset, What is the Constitution, and by whom was it created? I think that it has been demonstrated from the history of the country, from the controlling provisions of the instrument itself, and from the dormant powers which it recognizes as existing in the people, that the Constitution was created by one indivisible nation, one civil society possessing political sovereignty — the people of the United States, — and that it is the organic law of that nation.

§ 120. I hardly need apologize for dwelling so long and so minutely on this theme. The important lesson in which the public mind now demands to be instructed, is that of our own inherent nationality. It cannot be denied that an attachment, a devotion to the Union, pervades the great mass of citizens. The blood which has been poured out, the treasure which has been expended, the burdens which have been cheerfully assumed, abundantly attest this fact. But this has been rather the result of a sentiment, than of an enlightened conviction. The sentiment is powerful in impelling to action, but it should be rooted in a deliberate opinion. For many years prior to the late war the claims of the states to supremacy had been

persistently advanced ; the true theory ignored ; the teachings of our fathers forgotten. This process had wrought its complete results in the Southern States ; that it had not done the same in the Northern, was not owing to any lack of endeavor. Now, when it is universally conceded that the extreme theory of state sovereignty is, as a fact, overthrown ; now, while old things are passing away, and we are in the midst of a general awakening to our higher and better interests, should the true ideas of nationality be deeply impressed upon the public consciousness.



## PART SECOND.

IN WHAT MANNER AND BY WHOM IS THE CONSTITUTION TO BE AUTHORITATIVELY CONSTRUED AND INTERPRETED; OR, THE MEANS AND COMBINATIONS FOR ASSURING THE OBSERVANCE OF THE FUNDAMENTAL LAW.

§ 121. It was shown, in the Introductory Chapter, that the study of Political Law involves not only the questions, In whose hands is placed the exercise of governmental powers? and, To what laws is this exercise subjected? but also the question, By what means and combinations is the observance of these laws assured?<sup>1</sup> In other words, this department of jurisprudence includes the formal organization of the government, the distribution of powers and functions, and the checks and sanctions by which officials are kept within the limits assigned to them. I now proceed to a brief examination of the last of these questions.

§ 122. The Constitution of the United States is a Law, issued by the Supreme Power in the nation, — the people, as a collective political unit. This law, thus uttered by the people in their sovereign capacity, is, in some respects, addressed to and binding upon the individual members of the body politic; in most respects, it is addressed to and binding upon the different classes of officials who make up the government. Now, that an utterance of the Supreme Power may have a compulsive character, that it may truly be a *law*, there must be connected with it some sanction, some means of insuring obedience, of protecting the rights and enforcing the duties which it creates. Without this sanction, it would lose all the elements of a command, and become a mere request. This principle, which is confessedly true of ordinary legislation directed against the individual members of society, is no less true of the organic law directed against the govern-

<sup>1</sup> See § 10.

ment itself. A sanction must be connected with the latter as well as with the former. The great difference in the nature of the two classes of laws, in the persons to whom they are addressed, and in the acts or forbearances which they enjoin, must, of course, involve a corresponding difference in the sanctions appropriate to them. As the Constitution enjoins political acts and forbearances, the means for enforcing these commands will be, in a great measure, political. Since official persons, whether their functions be legislative, administrative, or judicial, must, from the very nature of their position, be clothed with an ample discretion, the ordinary punishments of the criminal law would be very inappropriate to restrain them within their prescribed limits of action. Should the transgression, however, be, not a mere mistake in the exercise of discretion, but wilful, intentional, or corrupt, there is no reason why the official person should not incur and suffer the same kind of penalties that are inflicted on private offenders. But the civil society which has constructed a government, and carefully defined the limits of the political powers which can be exercised thereby, may be as deeply injured by the honest misconceptions, the well-meant transgressions of its agents, as by their wilful and corrupt usurpations. Some remedy, therefore, must be provided for these violations of the organic law, these political acts which, though not wilful, are unwarranted by the Constitution.

There are three kinds or classes of sanctions which may be applied to the persons who compose the government, and by which a due observance of the provisions of the Constitution may be procured. (1) A civil officer may be impeached when his transgression is wilful, or corrupt. (2) The ordinary punishments of the criminal law may be inflicted when the transgression is made a crime. (3) The political act, which is beyond the limits of power defined in the Constitution may be judicially pronounced a nullity. The first and second of these sanctions are personal penalties inflicted upon the offender, and do not affect the nature and quality of the act which he has done; the third is not a personal punishment, it is not directed against the official, but attaches to the

act which he has done, and deprives it of any validity. If this act is in the form of a statute, it is void, creating no rights and duties; if in the form of an administrative measure, its political character is gone, and it becomes a mere private trespass.

§ 123. To apply these sanctions, and especially the third, the Constitution must be interpreted. In order to ascertain whether any political measure is in excess of the powers conferred upon the government, the number and extent of those powers must be fixed in an authoritative manner. Unless there exists some means of determining the meaning of the organic law, and thus of furnishing a criterion which may be applied to the acts of official persons, all attempts to enforce that law and restrain its violations would result in confusion. The first point to be examined, therefore, is, whether the Constitution can be authoritatively construed and expounded, and if so, by whom?

§ 124. This question must be divided, and its complete answer involves two others. 1. Does the function of interpreting and construing, in a final and authoritative manner, reside in the United States as a body politic, or in the separate states? And 2. Does it reside in all the departments of government, or in some one of them? These latter inquiries are entirely distinct; neither involves the other. It may be conceded that the authority in question belongs to the nation, to the exclusion of the states; but it does not necessarily follow that it is committed to any particular department of the government, or that it is shared in common by all.

The discussion of these two branches of the general subject, must, therefore, be kept distinct.

§ 125. I. Does the function of interpreting and construing the Constitution in a final and authoritative manner, reside in the United States as one body politic, or in the separate states? I need not dwell upon this portion of the theme in any extended manner. The course of reasoning which has been thus far followed applies here with equal force; and the conclusions that were reached through that reasoning are a definite answer to the present inquiry. If the Constitution of these United

States was formed by one self-existent political society, by the one people of this country, in virtue of their inherent attributes of sovereignty, then it follows, as a matter of course, that the capacity to interpret, construe, and give force to the provisions of that organic law, must exist in and through them; that the government which they have organized and set up, must have sole jurisdiction to pronounce upon the extent and character of the powers delegated to it by its own authors.

§ 126. In truth, as a practical fact resulting from the nature of our institutions, the people themselves, the aggregate of individuals who compose the body politic, are, through their electors, the final arbiters who must judge of the acts of their national rulers, and give construction to the instrument which they themselves have framed. All questions both of power and policy must finally be resolved by them. In the course of time their will becomes represented in all departments of the government, and is felt in all proceedings of that government. There are times, indeed, when the constituted authorities do not reflect the present thought and wish of a majority of the citizens; and the whole scheme was so contrived with checks and balances, that the governmental action should be steady, the changes gradual, the progress uniform. But elections are so frequent, and all officers, whether elective or appointed, so completely derive power from their constituents, that in the long run the deliberate conviction of the nation is executed by their agents. However much we may theorize, this is a fact which cannot be gainsaid or avoided. It is a fact which gives a practical and complete answer to the claims of state sovereignty, and the schemes for state aggrandizement and independence. Our whole history testifies to this inherent capacity of the people to interpret their own organic law.

§ 127. But while the people are thus the final judges, their decision can only be made by and through the government which they have ordained and established. This nation is not a democracy, and the constituted order of things must be strictly observed in all political acts. The government, through some or all of its departments, although it draws its inspiration from the people, is the sole actor in giving force and effect to

the popular will ; it is the proximate interpreter of the Constitution ; it practically decides as to the extent and character of the powers which it may wield. If the people are dissatisfied with the judgment, they put other persons in the place of those rulers who have failed to represent the nation's wish ; a new policy is inaugurated, and the error is thus corrected. In the two great political departments, the Legislative and the Executive, this change can be speedily made, and Congress and President readily brought into accord with the people. In the judicial department the process must be slower, but it is none the less finally certain ; judges, though appointed for life, will, at last, utter the opinion of the nation upon questions of constitutional power. The courts are a balance-wheel ; they give steadiness to the progress ; they equalize the development ; they cannot be a barrier in the way of all onward movement.

§ 128. To these general propositions all schools of theorists assent, except the ultra partisans of complete state sovereignty and independence. Madison, Jackson, and Taney, are as strong and pronounced in their opinion that the general government possesses the sole capacity to interpret and expound the organic law finally and authoritatively, and that whatever function may belong to the states is subordinate and auxiliary, as are Hamilton, Jay, Marshall, or Story. It is the settled conviction of the country ; a dogma which has been so generally accepted that it has passed into the common law of the land, in accordance with which the action of the national and state governments has proceeded with few interruptions. None but those who have accepted the teachings of Mr. Calhoun as the true exposition of our civil polity, have formally denied, or do now formally deny, this proposition. But, as has already been stated, these disorganizing views of Calhoun and his disciples have never been controlling in any department of the United States government, nor in many of the separate states.

§ 129. It is true that there have been a few exceptions to the almost uniform acquiescence of the local commonwealths to the claim of the United States to this branch of paramount sovereignty, even before the breaking out of the late war. A

few of the states, at an early period of our history, under the influence of political leaders who were opposed to the general government, declared their opinion by formal resolves, that the power of interpretation and construction resided alone in themselves. These expressions of opinion, however, were mere *brutum fulmen*; they were generally repudiated at the time; they led to no practical results; they did not impede the harmonious working of our institutions.<sup>1</sup>

§ 130. In a very few instances, prior to the late war, certain states, by some one or by all of the departments of their governments, formally resisted the authority of the nation to decide upon its own powers. The three most notable of these attempts will be mentioned. One was the Nullification Ordinance of South Carolina, which I pass by with this simple reference.

Another occurred during the presidency of General Jackson. The State of Georgia had passed certain laws respecting the Indian tribes within her territory, forbidding, among other things, any communication by white persons with such Indians except in the manner authorized by those statutes. Two missionaries, deeming this legislation to be in contravention to the Constitution of the United States, and therefore null and void, did have communication with the Indians in the prosecution of their calling as religious teachers. For this offence they were tried by Georgia courts, condemned and punished. Attempting to bring their case before the Supreme Court of the United States to be reviewed, the state government of Georgia at first refused to recognize the jurisdiction of that national tribunal; and after the Supreme Court had heard and decided the cause, pronouncing the law in question unconstitutional and void, and the imprisonment of the parties illegal, the state still refused to be bound by the judgment, and, in fact, never did yield to its authority.<sup>2</sup>

<sup>1</sup> See the "Virginia Resolutions of 1798," and the answers thereto of Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire, and Vermont. *Elliot's Debates*, Vol. 4, pp. 528-539.

See also, especially the "Kentucky Resolutions of 1798 and 1799." — *Ibid.* p. 540.

<sup>2</sup> *Worcester v. The State of Georgia*, 6 Peters' R. 515.

§ 131. The last instance which I shall notice occurred in our own times. A case arose in Wisconsin which grew out of the Fugitive Slave Law. An United States marshal had been engaged in arresting a person claimed as a fugitive slave, and was brought before the state courts in a proceeding wherein he relied upon the statute of Congress as his justification. The Supreme Court of Wisconsin decided that the act called the Fugitive Slave Law was unconstitutional and void. An attempt having been made to carry the case to the national court for review, the judicial authorities of Wisconsin held that their own action was final, and refused to obey the mandate from Washington.<sup>1</sup>

§ 132. Whatever opinion we may have in regard to the policy of Georgia's treatment of her Indian tribes, and of the expediency, morality, or even validity of the Fugitive Slave Law, we must insist that both these states acted in a revolutionary manner. If they were right, our whole political fabric has no coherence; is nothing more than a heap of sand, to be disintegrated by the slightest force that can separate the component particles. But these instances are exceptions only, never in future, let us hope, to be followed.

§ 133. While the doctrine is insisted on with the utmost emphasis, that the capacity to interpret and construe the Constitution in a final and authoritative manner belongs alone to the nation, to be exercised through its imperial government, it is not contended that the several states do not possess the same function in a subordinate and auxiliary manner. In fact, it is absolutely necessary that each commonwealth should, in many instances, primarily give a construction to the national organic law. This may be done either implicitly by their legislature in enacting, and by their governor in executing, a statute, or expressly and formally by their judiciary in passing upon the validity of such statute. For the Constitution, in many particulars, speaks directly to the states as political societies, limiting their legislative powers, and restraining them from adopting certain classes of laws. The question whether a proposed statute is forbidden by the Constitution *must* then,

<sup>1</sup> Ablemann v. Booth, 21 Howard's R. 506.

in the first instance, be presented to the state legislature ; the question as to its validity when passed, *may*, in the first instance, be presented to the state courts. → While the function of interpreting the organic law of the United States belongs, therefore, to the states, its exercise by them lacks the element of finality, of conclusive authority ; their determinations may be reviewed, disregarded, and reversed by the general government.

§ 134. II. Does this power reside in all departments of the national government, or in some one of them ?

Although it has thus been settled as a part of our civil polity, that the United States possesses the sovereign attribute of giving effect to its own Constitution, there has been more conflict of opinion in times past — and that conflict still exists to some extent among theorists — in respect to the question, what department of the general government is the final depository of this power to interpret and expound the organic law, and to define the extent and character of the functions committed by the people to their national rulers, and to the several states. It has been urged by some that each department — the Executive, the Legislative, and the Judicial, — is, in this respect, entirely independent of the others ; that each must decide, in regard to its own powers, for and by itself, and is not in the least controlled by the decisions and judgments of the others upon the same questions.

It has been held by others, that the Judicial Department, the Supreme Court, is, from the very nature of its official powers and capacities, the final arbiter ; and that its decisions are binding, not only upon the parties to suits litigated before it, but upon the several states, and upon the Executive and Congress.

§ 135. This latter opinion has practically been adopted and acted upon by the government and the people from the commencement of our present organization. In the great majority of instances, Presidents and Congresses, as well as states, have yielded to the expositions of law as uttered by the national judiciary. So constant has been this practice, that it forms the rule ; any deviations from it have been exceptional, rather



the results of individual opinion, than of any settled and definite policy.

I might rest my preference for the doctrine that the national Judiciary alone is clothed with the high power which it has exercised, upon this general assent ; but the correctness of that position can be established by considerations drawn from the Constitution, and from the nature of our government, which seem to be absolutely irresistible.

§ 136. Mr. Jefferson announced the principle that each department of the government was the sole judge of the extent and character of its powers under the Constitution, — or, in other words, was an independent interpreter of that instrument. In his private and public political writings he advocated this view with great earnestness, and acted upon it, in some instances, while President. After him, President Jackson reiterated the same dogma, brought it into bold relief, and based much of his official action upon it. I cannot but believe that the opinion adopted by these eminent men was in very great measure the result of personal qualities and temperament. The whole course of Mr. Jefferson's public life, and especially his private correspondence, show that he was bitterly hostile to the national judiciary from the very commencement of our Union. He was decidedly in favor of a form of government more democratic than ours, and looked upon the checks and balances contrived to restrain the action of the more immediate representatives of the people, with no favor. Mr. Jackson possessed an iron will and determination, and was unable to yield his own opinions to those of another. In our own times the dogma under consideration has been asserted by some public men and political writers who are warm partisans of the intrinsic and absolute nationality and sovereignty of the United States. Most of these gentlemen, however, belong to a school which is disposed to unduly exalt the Congress above the other coördinate departments of the government. None of these theorists would probably admit that the President had an independent and equal capacity with Congress to interpret the Constitution and to judge of the validity of a statute. This modern school — for the ideas they represent are new

in this country, — would raise the Congress to a position equal in power to that of the British Parliament, would reduce the Executive to the political level of the British Crown, and entirely destroy the Judiciary as a coördinate department of the government. It seems to be plain, to be, indeed, self-evident, that if the conclusions reached by Jefferson and Jackson should be adopted as practical guides in the administration of public affairs, our whole organization would at once fall in pieces; but that if the later notions as to the sole authority of Congress should be accepted, the government would rapidly change into an irresponsible tyranny, for the legislature would not be restrained by those deep rooted and ancient social and traditionary sentiments which are so strong a conserving power in Great Britain.

§ 137. The national government is composed of three separate departments, to each of which is confided a distinct class of functions and duties. Yet it is not in accordance with the truth to say that each is independent of the others. Each is so completely dependent on the others that without them it could practically do nothing. Congress is to pass laws, but not to execute or expound them. It is the province of the President to execute, but he cannot make. The Judiciary must expound, and apply to particular individual suitors, but can neither make nor execute. Each is therefore a complement of the others. Of these three classes of functions, that possessed by the Congress is undoubtedly by far the most important and efficient, affecting more immediately the interests of the people. That body holds the initiative in almost all public affairs; the President cannot execute, nor the Judiciary expound, a law until Congress has acted. The legislature must, therefore, in the very exercise of the capacities bestowed upon them, expressly or tacitly pass upon the meaning of the Constitution, and the extent of the powers they may wield. Their decision must be regarded as *prima facie* correct, and must stand and be enforced by the Executive until the Judiciary shall have pronounced it wrong, and the statute a nullity. The independent power of the President would seem to be limited to the exercise of his veto, by which he

may call the Congress to a second examination of the proposed measure, and require the unusual majority of two thirds to give it a compulsive character.

§ 138. What ruinous, destructive consequences would immediately result, if it should be practically admitted that the several departments might independently judge and decide as to the extent and character of the powers conferred by the Constitution! The collisions would as readily and as often arise between the Executive and the legislature as between either and the Judiciary. To illustrate: Congress passes a statute, which the President, deeming unconstitutional, vetoes. It is passed again, notwithstanding his objections, and thus becomes a law. The duty devolves upon the President to execute this law; but he, still regarding it as contrary to the provisions of the Constitution, and judging thereof independently, refuses to carry it into operation, although perhaps the courts may have pronounced it valid, and have adjudicated upon rights created by it; the law is thus made a dead-letter. How often must such circumstances arise to render the government an object of contempt, rather than of veneration and love?

§ 139. Again: Congress passes a statute which is approved by the Executive. Certain individuals, affected thereby, bring their case before the Supreme Court for examination. The law is decided by that tribunal to be null and void. This decision is admitted by all theorists to be binding upon the immediate parties to the suit in which it is rendered, so that they are released from the obligations of the law. If it be not also binding upon the government, we then have the astounding anomaly of Congress and the President insisting upon the validity of a statute *which is obligatory upon those persons alone who may choose to assent to it*; while all persons who refuse that assent, and bring their cases before the supreme tribunal, will be relieved from the duty of obedience. In other words, this law would be entirely deprived of all sanction; it would become a mere request; no obedience could be enforced; every recognition of its authority would be voluntary; the distinctive and essential element which constitutes law would be utterly lost.

§ 140. Such cannot be the true meaning of the Constitution. Our fathers never prepared for us such a mockery of government. No one but an impracticable theorist or a headstrong dogmatist would ever have thus read and understood the organic law. The calm good sense of the people has led them to the true doctrine, and in that they rest content, and in that their rulers must also continue.

§ 141. There must, therefore, be some judge, some single umpire, to whose arbitrament the government as well as the citizen are subject.

The very nature of the whole Constitution as a written grant of certain limited powers, as well as definite provisions of that instrument, show that (this umpire can only be the Judiciary.) The American Constitution is not, like that of Great Britain, traditional and elastic, consisting only in the acts and precedents of Parliament, which that legislature may either follow or avoid. It is a fundamental statute of the whole people, passed by them in their organic capacity, binding upon themselves and upon all the agents which they have set up and clothed with limited functions. Beyond this statute neither Congress nor President can lawfully go; going beyond, their acts are nullities and not laws. This is a position universally conceded.

§ 142. Now, it is a part of the essential province of the Judiciary, exercised without question not only by the courts of Great Britain and of the United States, but by those of every country possessing a systematic jurisprudence, to explain, expound, construe, and interpret statutes. It is their duty to determine what rights and obligations arise from these written declarations of legislative will; to declare upon whom and to what extent they confer rights, and upon whom and to what extent they lay obligations. It is a part of the same function which empowers the courts of this country to adjudicate upon the written constitutions of the nation and of the states. It is true that the jurisdiction is more momentous, more fraught with consequences for good or evil, demanding more ability, learning, and integrity, than the mere interpretation of ordinary statutes; but only so because the parties to

be affected are not simply private individuals, but organized governments; the rights and obligations to be ascertained and enforced are not those which belong to or rest upon separate citizens, but those which belong to and rest upon the constituted rulers. There is no difference here in kind, but in degree.

§ 143. It is true that the courts of Great Britain do not possess this high attribute, but only because there is no written British constitution superior to Parliament. The powers of that legislature are not limited; the constitution is, in effect, what Parliament may at any time pronounce it to be. It is not possible, therefore, that a question should arise whether, in the passage of any statute, Parliament has exceeded its powers. In our civil polity, this jurisdiction of the Supreme Court plainly results from the very nature of our organic law as a fixed written statement and enumeration of certain rights and powers conferred upon the general government; from the fact, in short, that it is a fundamental statute, which must be expounded and interpreted by the Judiciary in the same manner and for the same reasons as any other enacted law.

§ 144. But we may go beyond the general nature of the whole instrument, and refer the power of the Supreme Court as final arbiter to express provisions of the Constitution which recognize or create such a function. Article VI., Section 3,<sup>2</sup> declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land." It was shown in a former chapter<sup>1</sup> that the term "laws of the United States," in this section, is not confined to statutes of Congress, but includes every thing which has the binding efficacy of law, the unwritten or judicial as well as the written or enacted; and therefore embraces the decisions of United States courts upon subjects which are specially, exclusively, or finally committed to their jurisdiction.

In respect to some matters, the national Judiciary has an exclusive, or at least a final, jurisdiction growing out of the very character itself of the subjects adjudicated upon. In

<sup>1</sup> See § 99.

respect to other matters, the same courts have a jurisdiction neither exclusive nor final, but concurrent with that of the state tribunals, resulting not from the character of the subject adjudicated upon, but from the situation of the parties to suits brought before them. Of the first class are questions in regard to admiralty, to ambassadors, and many others; of the latter class, are questions touching ordinary private rights of ownership, of contract, and the like, when the parties are citizens of different states. Now, the decisions of the national Supreme Court involving subjects of the former class are "the supreme law of the land;" and, in rendering its judgments, that tribunal is always guided by its own convictions of what the law of the United States is or ought to be. On the other hand, its decisions involving subjects of the second class are not the supreme law of the whole land, but expositions of the local law of the particular state in which the controversy arose, and, in rendering them, the court always assumes to follow that law. Thus, in a suit between parties residing the one in Ohio and the other in New York, concerning lands in the latter state, the court would adopt and enforce the rules already settled by the legislature and the judiciary of New York. x

§ 145. Article III., Section 2, declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution and the laws of the United States." Cases of this kind which arise under the Constitution clearly belong to the first of the above-named classes. The considerations referred to in the former portion of this chapter apply here with peculiar emphasis. Over these cases the national tribunal has final control. However much the state courts may primarily adjudicate upon the same questions, their conclusions may be reviewed and set aside by the Supreme Court of the United States. Its judgments, therefore, giving construction and interpretation to the Constitution, are "laws of the United States made in pursuance of the Constitution," and, as such, are the "supreme law of the land;" and, if thus paramount, they must control the Executive and the Congress as well as private citizens.

§ 146. It might be urged that, if the national Judiciary are

to be entrusted with the capacity to decide in a final and authoritative manner upon the meaning of the Constitution, and the powers thereunder which may be wielded by the government and by the states, their interpretation would be fixed, unchangeable, unyielding to the demands of the people's progressive development; that the judicial habit of mind is such, so affected and guided by precedent and by technical methods, as to unfit them for the duty of giving construction to an instrument entirely political. There is no truth in this objection. The courts do yield to the pressure of the popular will, do move with the popular progress, slower perhaps than legislatures and Presidents, but as certainly and as efficiently. In truth, the independent judiciary in England and the United States have been the most important instruments in developing the private law so as to keep it commensurate with the wants of an advancing society. Old political precedents may be as easily disregarded as those which affect the personal rights and duties of the citizen. But it is true that the movement of the Judiciary will be generally more slow and uniform than that of legislatures and executives. This fact, instead of being an objection, is a consideration of great weight in favor of giving to the national Supreme Court the function of interpreting the Constitution. That instrument, as the organic law of the whole people, is the source of all other legislation. Its meaning should be measurably fixed and certain. Congress may readily and frequently change its policy; its work may be done under the influence of a momentary pressure; it may commit mistakes which require speedy amendment; and the consequences, though evil, are transitory; they do not reach to the very foundation of the political structure. But rapid and sudden alterations in the construction of the organic law, assumptions of powers one day which are denied the next, affect the entire body-politic; they place every citizen in a state of constant uncertainty as to his rights and duties; they produce a condition of partial anarchy. England has its traditions, its social classes, its reverence for the past, to give steadiness to political progress. We have rejected these as inconsistent with our republican institutions. If we also reject the Judi-

ciary as a controlling element in our civil polity, we shall be left without any thing to give stability to the administration of affairs, to render the growth which all desire, healthy and permanent, the progress continuous and sure.

§ 147. But it is sometimes objected with more plausibility, that to concede the attribute of finally and authoritatively interpreting the Constitution to the Supreme Court, would be to exalt the Judiciary above both the other departments, to make it, practically, the only law-giving power. This objection, is, however, based upon an entire misconception. The function of the court is essentially a secondary one, inferior in every respect to that belonging to Congress. It cannot move until the legislature has acted. It cannot pronounce beforehand upon the validity of a proposed measure. It cannot proceed directly against the other departments. It must wait until a "case" be brought before it by litigant parties, and as such case may involve a construction of the Constitution, the rights and duties of these parties cannot be ascertained and declared without passing upon the meaning of the fundamental law. Important, therefore, as is the function in question, it is intrinsically subordinate to those of the legislature and the Executive. It should be remembered, also, that the Supreme Court, as a distinct and co-ordinate department, was created, and the judicial powers which it may exercise, were conferred, by the same sovereignty that created the legislature and the Executive, and endowed them respectively with their political capacities. The people could ordain and establish such agents as they pleased, and distribute functions in the manner which seemed to them best. Each department rests upon the same foundation; each wields an authority granted by the same giver; and the action of each within its appointed sphere cannot be regarded as an infringement upon the prerogatives of the others.

§ 148. I have purposely thus far refrained from citing any judicial authorities in support of the position that the national Judiciary is the final arbiter as to the meaning of the Constitution. In fact, the whole history of the Supreme Court is an authority. Every case involving a construction of the Con-



stitution, and a judgment as to the validity of a statute of Congress or of a state legislature, or act of an executive officer, is an implied assumption of the power under discussion. In several important and leading cases, the question was raised and examined by the Supreme Court of the United States with a cogency of argument which never has been, and never can be, answered. It is sufficient to refer to the very early case of *Vanhorne's Lessee v. Dorrance*,<sup>1</sup> and to the cases of *Martin v. Hunter's Lessee*,<sup>2</sup> and *Cohens v. The State of Virginia*,<sup>3</sup> for the opinions of Chief Justice Marshall and of Mr. Justice Story, and to the recent case of *Ablemann v. Booth*,<sup>4</sup> for the judgment of Chief Justice Taney. These cases should be diligently and carefully studied, not only by all gentlemen preparing for the legal profession, but by all who are preparing for the higher duties of active American citizenship, both as models of juridical learning and ability, and as statements of the principles upon which our whole political system is based. If any matter can be put at rest by an unvaried course of judicial decision, and by an almost constant assent of the Executive and the legislature, and by an acquiescence and approval of the people, the truth that the national courts are the final judges of the meaning of the Constitution, and the extent and character of the powers conferred upon the United States government and upon the several states, may be considered as established.

§ 149. It was stated in § 122 that there are three classes of sanctions applicable to official persons by which the observance of the organic law may be assured. It remains to describe, in a brief manner, the method of applying these coercive means. Two of these sanctions are personal in their nature, applied directly to the offender. The first is impeachment, which may be prosecuted against the President, Vice-President, and all civil officers of the United States for treason, bribery, or other high crimes and misdemeanors.<sup>5</sup> The whole subject of impeachment will be examined at large in a subsequent chap-

<sup>1</sup> 2 Dallas' R. 304.

<sup>3</sup> 6 Wheaton's R. 264.

<sup>5</sup> Const. Art. II. Sec. 4.

<sup>2</sup> 1 Wheaton's R. 304.

<sup>4</sup> 21 Howard's R. 506.

ter. It is sufficient now to say that the House of Representatives has the sole power of inaugurating the proceeding,<sup>1</sup> and the Senate are the sole judges for trying the accusation.<sup>2</sup> It is generally conceded that impeachment is a sanction applicable not only to acts which are made crimes by the law, but also to political acts which are wilful, intentional, and corrupt, and of course, to intentional violations of the Constitution by a civil officer.

But the law regards many wilful and corrupt political acts done by official persons as positive crimes; and for these the offender is liable to be indicted, tried, convicted, and punished according to the ordinary course of administering the criminal law. This subject, however, hardly falls within the scope of constitutional law, and will be passed by without further comment.

§ 150. By far the most important means for assuring the observance of the fundamental law, is the power residing in the courts to declare a statute of Congress or of the state legislatures void, and an executive act unauthorized, when in contravention to the provisions of the Constitution. The other sanctions punish the offender, this relieves the citizen; the others do not affect the wrongful measure, this takes away its power to injure; the others look chiefly to the guilt of the official agent, this to the rights of the people. Assuming that the Supreme Court of the United States is the final depository of this power, we are to inquire how that tribunal is to proceed in the exercise of its most important attribute. The Constitution which creates the Supreme Court, defines its jurisdiction. The exercise of this jurisdiction is confined to "cases" and "controversies."<sup>3</sup> "Cases" and "controversies" plainly refer to the same thing, and are general words to describe the ordinary proceedings by which the contentions of litigant parties are brought before a judicial tribunal for decision. A "case" or "controversy" involves the idea of a party prosecuting in a court to establish or maintain some right or enforce some duty against another party. The Supreme Court, there-

<sup>1</sup> Const. Art. I. Sec. 2, § 5.

<sup>2</sup> Const. Art. I. Sec. 3, § 6.

<sup>3</sup> Const. Art. III. Sec. 2, § 1.

fore, can only exert its function of interpreting the Constitution, by hearing and determining some case or controversy brought before it. The adjudication upon the rights and duties of the parties is the principal thing, the construction of the Constitution is incidental. The Supreme Court cannot, under the form of a case brought before it, interfere with the political functions of the President or of Congress. Thus an injunction could not be issued to restrain the President from enforcing a statute on the ground that it was contrary to the Constitution and void; a suit demanding such relief against the Executive would not even be entertained. The same would be true of any attempt to restrain Congress as a body, or individual members of the legislature, from passing a proposed measure. This point was expressly decided in the recent extraordinary case of the State of Mississippi *v.* Andrew Johnson, to which a more extended reference will be made in a subsequent chapter.

Thus the duties of the Congress, the President, and the Supreme Judiciary are kept distinct; the work allotted to each is left in its own hands; it is only the results of that action, the juridical rights and duties created by it, which can give rise to an opportunity for the Supreme Court to examine the work itself and pronounce upon its validity.

## PART THIRD.

WHAT POWERS, CAPACITIES, AND DUTIES ARE CONFERRED OR IMPOSED UPON THE NATIONAL GOVERNMENT, AND WHAT ARE CONFERRED OR IMPOSED UPON THE SEVERAL STATES!

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### CHAPTER I.

THE LEADING IDEAS OF CIVIL POLITY WHICH ENTER INTO THE ORGANIZATION OF THE UNITED STATES.

§ 151. I NOW pass to the third grand division of the subject, which is the one of most practical importance, and in respect to which the most minuteness of detail and illustration is needed: What are the powers and capacities of the government of the United States?

In treating of this theme I shall proceed in the following order:—

*First.* To develop, in a brief manner, the leading ideas of civil polity which are involved in the whole complex system of political organization;

*Secondly.* To describe the external form of the government, and the methods by which the machinery is kept in motion; and

*Thirdly.* To state and discuss the powers and functions of the Legislative, the Executive, and the Judicial Departments separately.

§ 152. What are the leading ideas of civil polity involved in the complex system of political organization, which the people of the United States has contrived?

Thus far our thoughts have been constantly directed to the nationality of the one people of the United States, and to the

capacities which inhere in them by virtue of that nationality. I have purposely refrained from speaking with any emphasis and at any length of the limitations which the people has placed upon its rulers. The division of powers and the rights of the separate states under the Constitution have been designedly kept out of view. The phrase, "rights of the states," is used advisedly. The quality of sovereignty is denied to these local communities; the term "sovereign states," I deem to be illogical, absurd, opposed to the truth of history. (But, still, the states have rights as perfect within their sphere, in the present condition of our organic law, as those of the general government) Their only badge of inferiority is, that the people, if they see fit to proceed by the means of amendments to the Constitution, may abridge, or even destroy them.

§ 153. But while our fundamental law stands untouched, the powers of legislation and administration held by the several states, are derived from the same source, rest upon the same foundation, are affected by the same attribute of inviolability, as those reposed in the government of the United States. That single source, that common foundation, is the people. It is true that the powers and functions intrusted to the central organization have a wider field of activity, are, in their essence, higher and more national than those intrusted to the local commonwealths; but within their respective limits of operation, each class is uncontrolled by the other.

§ 154. Such is the plan of the entire political structure, and its wisdom and efficiency have been proved by the whole course of our history. Those affairs which are peculiarly national, which affect the body of citizens, are managed by the one central government created by the people. Those affairs which are local, which affect the individual citizen in his private capacity abstracted from his relations to the whole political society, are managed by the separate state governments which were found in existence and left remaining in existence by the same Constitution.

§ 155. The whole civil polity is thus based upon two grand ideas as its foundations and supports; the idea of Local Self-Government, and the idea of Centralization. The first was

borrowed from the tribal customs of the Saxons and other Germanic tribes who invaded Western Europe ; the second is a heritage from Rome. The one is the safeguard of liberty ; the other the source of power ; — liberty and power, two elements which should enter into every political society. The history of the world is the history of struggles between these contending forces. In a perfect State they would be so combined that there should be just so little power as was necessary to protect and guarantee the largest amount of liberty. It is a nice equation to adjust so that these variables may exactly counterbalance each other. The endeavors of the one force to rise, and of the other to repress, have checkered the annals of every people with wars, anarchy, oppression, and revolt. History points to but few instances in which an equilibrium has been reached and for any long period of time maintained. England and our own country are, perhaps, the only countries in our own age in which it can be pretended that the contending forces have settled to rest.

§ 156. A single, centralized government is necessary in order that there should be power to maintain the integrity of the nation. Local self-governments are necessary in order that there should be individual liberty enough to meet the encroachments of the central power and maintain the freedom of the citizen. As political writers have regarded the one or the other of these results the more important, they have favored the one or the other form of administration.

Jefferson was, in theory, a passionate lover of liberty, and he was fearful that the Constitution gave too much scope to the national rulers. Other public men of a former day dwelt more on the necessity of a strong force at the centre to keep together the parts whose natural tendency was outward ; and they feared that the several states had been left in possession of too many and great capacities, which would finally be destructive of unity, and, as a consequence, of liberty. We believe that both these schools of theorists were wrong. We believe that the Constitution grants to the agents appointed to manage the national affairs, power enough to meet any emergency. We also believe that it has clothed the separate states

with capacities to limit and restrain any unlawful exercise of that power, and to preserve our liberties to all time. Our fathers, by an almost divine prescience, struck the golden mean, and devised a scheme in which these opposing forces meet, not to neutralize and destroy, but to support and strengthen each other.

§ 157. Both of these elements are necessary to the highest good of the nation. Blot out the states, or reduce their functions to a mere form, and the general government, although elective, would ere long, become a despotism. We should have repeated, in our own country, the imperial policy of the French, of an emperor who was chosen by the almost unanimous vote of his subjects. Blot out the general government, or reduce it to a shadow, and we should destroy our prosperity, and with it the means of maintaining our position and influence among nations; we should inaugurate a condition of prostration and anarchy worse even than that of the Confederation. While, therefore, I oppose any attempts on the part of the separate states to assert their own sovereignty, I would oppose, with equal earnestness, any attempts on the part of the nation towards consolidation.

§ 158. Let us examine a little more closely the manner in which the idea of local self-government has been applied in organizing the American people. The principle is made effective at the very foundation of the system. We have the ascending scale of towns, counties, states, nation. Villages and cities are modifications of towns, created under special acts of incorporation, rather than by the general laws of the commonwealth. In each of these four grades, rights, powers, and capacities are exercised, which are limited by the territory and the peculiar local needs of the particular class. The people of a town meet to discuss and settle certain matters which relate solely to their own small vicinage. The people of a county choose a legislative body which manages the concerns of that community, consisting of several towns. The people of a state delegate their powers to a government, whose jurisdiction extends through the limits of that commonwealth, and includes all subjects of legislation which affect the citizen in

his personal and private relations, which define his rights of security and property, and the obligations he incurs by virtue of his being a local inhabitant, or by virtue of his acts towards others. Finally the people of the United States delegate a portion of their powers to rulers, who may legislate for them in respect to all matters which peculiarly concern them as a nation.

§ 159. According to our present policy, this gradation is fixed. It might, indeed, be destroyed. Any state might so change its organic law as to dispense with the divisions into towns and counties, and might commit to the state legislature the entire control over subjects of the most trivial and local interest. That body might be invoked to lay out every road, build every bridge, or lay every partial tax and assessment.

Such an alteration would be antagonistic to principles which are a part of our race life. For we did not invent this method of distributing legislative and administrative functions among local communities, this scheme of dividing the labors and duties of government, and allotting a special portion to that body most capable of performing it. The germs of this policy are to be found among the rude Saxons in England at the earliest period which history permits us to reach in our explorations of the past. The other Germanic tribes who settled in Western Europe, exhibited traces of the same ideas among them, before being overwhelmed by the barbaric force of feudalism, and buried under the imperial policy borrowed from the traditions of Rome. The Saxon Hundreds and Shires are the historical representatives of American towns and counties.

§ 160. "The free Anglo-Saxons and their territory were divided up, for the purposes of civil administration and the preservation of peace and mutual protection, into separate local organizations. At the basis of this lay two elementary principles, the tie of the family, kindred or clan, and the tie of territory. During the period of Anglo-Saxon history with which we are acquainted, the Tything was the elemental division. This does not seem to have been founded upon a territorial basis, but was composed of ten families or households of freemen not in the 'mund,' or under the protection, as was



sals, of a superior lord. The head or officer of this small organization was the tything-man, answering to the 'Decanus' among the Franks. Each head of a family was answerable for the good behavior of all the other members of his tything, and thus the whole society was organized upon the principle of local and personal suretyship.

§ 161. "The division next in order to the Tything was the Hundred. It has been assumed by different writers to have been composed of a hundred hydes of land, of a hundred free families, of a hundred tythings, or of a hundred freemen. One supposition would make its basis territorial, the others numerical. It is certain, however, that the Hundred contained a considerable number of free households; that it was a permanent association; that it had a chief officer or head called the Hundred-man; that once in each month the freemen assembled in a district court, where they not only transacted judicial business, but conferred and determined upon all other matters of local interest. This union of the free men of each hundred into a local tribunal was, indeed, the distinguishing feature of the association. The Burgh was only a hundred or an union of hundreds in a more compact form, surrounded by a moat, or stockade, or wall.

§ 162. "The Shires were strictly territorial divisions. Some were in their origin ancient Kingdoms, as Kent, and Sussex; others were formed by a dismemberment of these states. The shire, having definite boundaries, included within its limits free inhabitants grouped into tythings and hundreds, and kings' thanes with their vassals, and religious houses and corporations with their tenants and dependents. The chief officer was the Ealdorman. The local affairs were administered through the shire-courts.

§ 163. "These territorial divisions of the Anglo-Saxons, together with some of their powers and privileges, have been retained to the present time in England and most of the American states. Our own counties and states, with their local legislation, represent the Saxon idea of a political organization, in withdrawing the administration of much that concerns the interests of the people, from the central or imperial govern-

ment of the state, and confiding it directly to the body of citizens within the limits of the district.”<sup>1</sup>

§ 164. We have thus a plain, historical origin of the principle of local self-government. This element lay at the foundation of the whole Saxon polity. It has been preserved in the English shires and ancient municipal corporations or boroughs, with their immemorial privileges. In many of the American states it is guarded with even more jealousy than in the mother-country. We have extended the principle a step farther; to our towns and counties we have added the states. But all of this scheme is but the outgrowth from the primitive germ that existed in the Saxon Tything.

As these local divisions, with their gatherings of the people, and their territorial jurisdiction, preserved the seeds of liberty in England, and finally triumphed over the crown in the progress of their development into a complete representative form of government, so are the same and similar local communities among us necessary to the preservation of liberty and the maintenance of that due balance which shall at once prevent anarchy and absolutism.

<sup>1</sup> Pomeroy's *Introduction to Municipal Law*, §§ 386-390.

## CHAPTER II.

### THE EXTERNAL FORM AND ORGANIZATION OF THE GOVERNMENT.

§ 165. THE subjects presented in the present and succeeding chapters require a constant and careful examination of the very letter of the Constitution. Thus far the organic law has rather been treated as a whole, as the work of one people, as the expression of the national will. An endeavor has been made to obtain a just conception of its general character, and of some elemental ideas of civil polity which find utterance in its provisions; we now pass to the instrument itself, and commence to investigate its several parts, and answer the most important and practical inquiry, What are the Powers of the National Government?

In the discussion of this question, I now proceed to describe the external form, structure, and organization of the government which the people contrived and established as the means of creating, interpreting, and enforcing a system of national law for themselves. This scheme, so far as it is a mere external form, may be readily comprehended; the written provisions which describe and set it forth are concise and plain: little amplification of the very text is needed. The point which naturally suggests itself is, whether this plan be well adapted to work out those grand results which were proposed to themselves by the framers of the Constitution, — the formation of a perfect union, the establishment of justice, the maintenance of domestic tranquillity, provision for the common defence, promotion of the general welfare, and security of liberty to ourselves and our posterity. For these high purposes was the Constitution ordained, and the government established. Are the means the most appropriate to the ends? But, as was

stated in the Introductory chapter, no attempt will be made to enter into a full examination of these topics, or to present in any detailed manner the considerations which would enable us to arrive at a final decision of the question whether our government is so constituted as to promote in the best manner the interests of the people. For a complete discussion of this and kindred subjects, the student is referred to works professedly treating of civil polity, — to Dr. Lieber's "Essay on Civil Liberty and Self-Government," his "Treatise on Political Ethics," and to "The Federalist."

There are some salient features of this political organization, some fundamental principles upon which it is based, which enter into and give form to the whole structure, to which our attention may well be directed. These features will, therefore, be examined in the succeeding sections of the present chapter.

## SECTION I.

### THE SEPARATION OF THE GOVERNMENT INTO THREE CO-ORDINATE DEPARTMENTS.

§ 166. We are met at the outset by the fact that the government is separated into three departments, acting in a great measure independently of one another, to each of which is assigned an essentially different class of functions, and yet between which there is so strong a tie of mutual support and correlation that each would be powerless without both the others. These departments are the legislative, the executive, and the judicial.<sup>1</sup> When we turn to the separate states, we find all their governments constructed upon the same plan. Was this contrivance accidental, was it based upon any *a priori*

<sup>1</sup> Falck (*Cours d'Introduction Générale a l'Étude du Droit*, chap. i. § 40, note 33,) denies that the judicial power is a separate branch of sovereign power, or that the judiciary is a separate department in the government. He asserts that it is only a special manifestation of the executive. No doubt a continental theorist finds it difficult to comprehend the independence of the English, and particularly of the American judiciary.

theory, or had it an historical origin? It was both theoretical and historical.

§ 167. If we look to Great Britain, whence we have derived so many ideas of civil polity and so many forms of administration, we discover that her imperial government is modelled after the same pattern. The American President, Congress, and Judiciary are reproduced in the British monarch, Parliament, and Courts. But there is danger in pushing the analogy too far. Nothing has been productive of more confusion than the habit of arguing from the English to the American Constitution. General resemblances there are; but the essential difference in all the practical details, and in many of the fundamental principles, renders it very unsafe to draw analogies from the British organic law as aids in construing our own. (When we look close into the English system, we shall perceive that the separation of the three departments with them is not so complete as with us.) The actual executive of Great Britain, upon whom rests all the responsibility of administration, — the ministers of the crown, — have seats in Parliament, and are directly amenable to, and under the control of, that legislature. The highest judicial officer — the Chancellor — is a member of the Cabinet, and presides over the House of Lords; while other judges may be members of the same body. The Chamber of Peers is the supreme tribunal of appeal, which may review the decisions of the courts of law and of equity; while a committee of the Privy Council has a very extensive appellate jurisdiction over other classes of courts.

§ 168. Should a survey be extended over the modern nations of Europe, or over the peoples of ancient times, no others will be found in which this type of government is so distinctly followed; and many have existed in which it has been entirely disregarded. In Rome, during the Republic, there was an approach towards such a division of functions among the Consuls, the Prætors, the Senate, and the People. But when the Empire had become firmly established, and the imperial policy completely organized, the traditions of the Republic were forgotten or abandoned; and all legislative, executive, and judi-

cial authority was theoretically and practically lodged in the hands of the august ruler who presided over the destinies of half the world. In France, Austria, Prussia, and especially in Italy, some approach has been made to a constitutional government, and to a separation of legislative and executive powers. In none of these countries, however, except in Italy, does this separation approach in completeness and efficiency that which exists in Great Britain; and in none of them can the judiciary properly be called an independent, co-ordinate department of the government.

§ 169. One fact of history may be considered as established, — that there has been and is the greatest amount of individual and political liberty in those nations whose governments are framed upon this tri-partite model; and that just so far as the civil polity approaches towards a despotism are all species of power centred in one ruler or body of rulers. If the entire governmental force of a nation is wielded by a single person or class of persons, if he or they may at once make, interpret, and execute laws, there is inevitably abuse of power, destruction of private rights, whether the one ruler be monarch, legislature, or the entire mass of the people themselves.

§ 170. A proposition which is thus historically true, must have some firm foundation in the nature of things. The possession of power is one of the most dangerous gifts which can fall to the lot of humanity. The tendency is always to its abuse. Power grows upon itself. In a perfect state, it is not enough that the rulers at any given time should be perfect men. There must be checks so contrived as to resist the encroachments of authority, which are to be apprehended even from the purest and most patriotic rulers. No other check has proved so effectual as the division of functions into legislative, executive, and judicial, and their assignment to classes of officials physically separate. If the legislature were also judges, their decisions would not be based upon the law as it is; but, as it would be impossible for the same men to keep their two characters entirely distinct, their judgments would rather be arbitrary enactments, special measures of legislation for each particular case. Thus all certainty as to the law

would be lost. If the same person or class of persons were to make and execute the laws, the results would be still more disastrous; for, in applying any particular statute, whatever deficiencies in its provisions had been left by the rulers in their legislative capacity, could be easily supplied by them while acting in their executive capacity. Thus the laws, instead of being general commands enjoining the observance of general rules, would become special commands addressed to individual members of society. This uncertain and special nature of the law is the very essence of an arbitrary and tyrannical government.<sup>1</sup>

§ 171. Divide these functions, and each is met by resistance from the others; all must conspire to give efficacy to any attempt against personal liberty and private rights. Have the Congress erred, the courts may recall them to their duty. Does the President transgress the limits of his authority, the legislature may force him into his legitimate sphere. Thus the whole government is a nicely-contrived balance, in which the equable poise cannot long be disturbed.

§ 172. The Constitution provides, in Art. I. Sec. I., that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" in Art. II. Sec. I. § 1, that "the executive power shall be vested in a President of the United States;" and, in Art. III. Sec. I., that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

§ 173. This language is clear, precise, and apparently without exception or limitation. Yet, when we compare it with other clauses of the Constitution, we shall discover that the separation of functions is not thus perfect; that the several departments are not thus absolutely independent of each other. Indeed, such an ideal independence is impracticable. While the classes of functions committed to the legislature, the executive, and the judiciary may be generally or in the mass distinct, there must be, in the very nature of things, some

<sup>1</sup> Montesquieu, Book II. chap. vi.

points of contact, some overlapping, some commingling. All this threefold machinery tends towards one object, — the creation and protection of legal rights, and the creation and enforcement of legal duties. It is impossible to keep the lines of communication perfectly separate until they meet in the very point at which they are directed. How much of this intermingling shall be permitted will, of course, depend upon the opinions and convictions of those who frame and adopt a form of government. We do not admit as much as is found in the British constitution. It cannot be denied that the government is stronger, more compact and harmonious, from these partial interferences of the various departments. The problem presented to the people was, to frame a constitution which secured the largest amount of liberty with a sufficient degree of strength and unity in the entire administration to maintain and perpetuate our free institutions. A perfect ideal, therefore, had to give way to some practical necessities.

§ 174. Although the Constitution, in its general language, vests the legislative power in a Congress which is declared to consist of a Senate and a House of Representatives, yet a reference to other portions of the organic law shows that this Congress does not, in fact, possess the sole legislative function. No law can be passed without the consent of the Executive, unless two thirds of both houses shall finally concur therein. The assent of the President is as necessary to the enactment of any measure having the nature of law, as that of a majority of both branches of Congress. In this the President legislates. His affirmative or negative decision is a step in the process of creating, and not of executing, laws. By virtue of the various provisions of the Constitution, the Congress is in fact, though not formally and in terms, composed of three distinct bodies, — President, Senate, and House of Representatives; and all must concur, with the single exception just noticed, that a two-thirds vote of both the other branches avails against the dissent of the Executive.

§ 175. But the legislative function of the President is in every way inferior to that held by the Senate and by the House of Representatives. This inferiority consists, first, in



the fact that his negative vote may be overruled by two thirds of the Congress, or, in other words, that a majority of two thirds practically dispenses with his concurrence; and, secondly, in the fact that the President cannot originate any legislative measure. He may communicate information, and recommend measures to the consideration of Congress (Art. II. Sec. III.), but he cannot directly set in motion any scheme of legislation; he must await the definitive action of the two Houses, and add or refuse his consent to their perfected work.

§ 176. It is evident that our own national legislature is, in respect to the power of the Executive, copied from that of Great Britain, which consists of three orders, — King, Lords, and Commons. But here, as in many other important features of the American civil polity, it is dangerous to push the analogy too far. While the resemblance between the power of the Crown and that of the President lies on the very surface and at once arrests attention, the differences, which lie deeper, are far more important both in theory and in practice. These differences inhere in the very constitution of the British Parliament, as compared with that of the American Congress. In pure theory, the Parliament is composed of King, Lords, and Commons. At one time this theory represented an existing and potent fact. Its outward form is preserved to the present day; and not a statute is now passed which does not purport to be “enacted by the Queen’s Most Excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.” But, while the form is clung to, the substance has gone; the crown is a mere pageant; the executive department is virtually merged in the legislative; the ministers, who are and must be members of Parliament, possess, as such members, the function of originating measures; but the power to refuse the Executive consent to measures that have passed the two Houses has practically ceased to exist. While, therefore, the words which are generally used to describe the legislative function of the British Crown are far stronger than those which define the similar

capacity of the American President, the substantial power of the latter is by far the greater. It is said that the King has the prerogative of an absolute veto; the exercise of this prerogative would doubtless produce a revolution. As the ministers who constitute the responsible executive are members of Parliament, it follows as a matter of course that the British Legislature has grasped and now wields both the creative and the administrative function, and that the assent of two Houses or branches only is practically necessary to the enactment of law.

§ 177. The President's power of legislation is far more substantial. His independence of the Congress constitutes him an effective check upon the acts of that body. Nothing less than a two-thirds majority of both Houses can reduce him to the level of the British Crown. The doctrine has been advanced and maintained with some earnestness, both in former times and recently, that the President can only refuse his assent to a proposed measure when he deems it to be unconstitutional, to be a step beyond the limits of legislative authority, an usurpation of power by the Congress. There is no ground whatever for this notion. The Constitution places no restraint upon the discretion of the Executive. He may be guided by motives of expediency in granting or withholding his affirmative vote, as well as any Senator or Representative. Art. I. Sec. VII. says: "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it; but, if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and, if approved by two thirds of that House, it shall become a law. . . . If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if

he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

“Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him ; or, being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.”

Here are no restrictions upon the nature and quality of the objections which the Chief Magistrate may oppose to any statute. That Presidents have seldom exercised their right to stop the passage of any measure because they deemed it to be inexpedient, while they admitted its constitutionality, is no ground for denying the existence of the power. They have generally deferred to the direct representatives of the people on all questions of mere policy.

§ 178. Is the assent of the President necessary to amendments of the Constitution proposed by the Congress? In other words, is such an amendment a bill, order, resolution, or vote, which must be submitted to the Executive for his approval? The uniform practice of the legislative and the executive departments has answered this question in the negative ; and the construction thus placed upon the Constitution may be considered as final. Several independent considerations lead to this result. The language of Art. V. is quite different from that used in Art. I. Sec. VII. : “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution,” &c. “Congress” is here used in its technical sense as descriptive of the two Houses. As two thirds of each House are necessary to initiate the process of amendment, it would seem unnecessary to require the assent of the President, when a majority so great may overrule his dissent. Finally, a proposed amendment does not seem to be an “order, resolution, or vote” intended by the § 3 of Art. I. Sec. VII. Such an act of Congress is in no sense legislative ; it is a mere proposal ; it has

none of the elements of law ; it is a laying before the people certain propositions for their consideration ; and the people, through their state legislatures or conventions, are the sole legislators. This subject has received much attention in very recent times, as well as at the earliest period of the present government, and has been settled so far as the joint action of President and legislature can settle a question of construction.

§ 179. The Executive possesses another legislative function of an exalted character. Treaties entered into by the United States are declared by the Constitution to be the supreme law of the land.<sup>1</sup> Their quality as law is so high that Congress can only destroy them by a single act of legislation, which is a declaration of war against the nations with whom they are made. Yet the treaty-making power, this authority to pass laws which shall be supreme even over the ordinary proceedings of Congress, is confided to the President, under the single limitation that his work must be submitted to the Senate and ratified by two thirds of that body.<sup>2</sup> He, however, holds the initiative ; the upper House can only accept or reject his decrees, they cannot dictate a treaty.

§ 180. I will very briefly mention some further instances in which the peculiar functions of one department are partially shared by another. The appointment of officers is plainly an executive act, and the power to appoint is conferred upon the President, or some of his subordinates. Yet all appointments made by the President must receive the concurrence of the Senate.<sup>3</sup> The trial of impeachments is peculiarly a judicial act, yet the Senate is the only court for that purpose.<sup>4</sup> In addition to these cases of direct interference, there exist features in the general organization which afford opportunities for the exertion of a vast influence by one department upon another. The judges are not chosen independently of the President and the Senate, but are placed in office by the concurring assent of both. The House of Representatives may be called upon to elect the Chief Magistrate himself in the event that a

<sup>1</sup> Const. Art. VI. § 2.

<sup>2</sup> Const. Art. II. Sec. II. § 2.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid. Art. I. Sec. III. § 6.

majority of electors have failed to unite upon the same person for that office.<sup>1</sup>

§ 181. While, therefore, the general plan of the government assumes three co-ordinate, independent departments, and while these several departments are, in the main, free from each other's control, they are, from necessity, linked together by many ties, both of function and of influence. One does, at times, perform some of the peculiar duties of another.

I have here purposely refrained from speaking of the vast legislative attributes which inhere in a free judiciary under our own and the English system, because this would lead into an extended discussion foreign from the immediate purposes of the present work.

§ 182. Among these three departments there will always be a tendency in each to encroach upon the special province of the others, or to enlarge the sphere of its own governmental action. The Constitution endeavors to draw the lines of demarcation between them; they are placed as checks upon each other; the whole system was carefully planned so as, if possible, to prevent any and all acts of usurpation, by making one department necessary to the others. But the organic law must, of necessity, use general terms; it cannot descend to any minuteness of detail without becoming a code of special precepts rather than a guide to the government in its work of legislation. The checks and counterpoises of the Constitution, are also, in a great measure, moral; the sanctions are slow in their operation, and may never be put in motion. Admirable, therefore, as is the system, it cannot entirely prevent those results which naturally flow from the possession of power; each department will strive to increase the scope of its own functions, even at the expense of the others.

§ 183. In this inevitable struggle the popular branch — the legislature — will always obtain and hold the ascendant. The superiority which thus belongs to Congress results from two causes, — the greater power of that body, and its greater inclination to use that power. It is in itself plainly the most powerful in that the function of creating law is higher, and more

<sup>1</sup> Const. Art. II. Sec. I. § 3.

forcible than that of applying or expounding. The other departments must await the action of the legislature, which always holds the initiative ; and neither of them can bring any sanction to bear directly upon that body, and thus prevent its contemplated acts. It, therefore, more than the others, can break over the barriers which the organic law has raised to restrain its lawlessness. The history of England shows how Parliament has advanced, step by step, in its acquisitions of power, until it has reduced the crown to a cipher, and made the ministers of the King its own servants ; and how, finally, the Commons has substantially drawn all these vast accumulations of power to itself, and forced the Lords into a position of comparative insignificance. It may be said that Parliament has been restrained by no written Constitution defining the exact measure of its functions. This is true ; but it has been restrained by influences more potent than written enactments can be, unless the will and consent of the people is constantly upholding and giving life to the positive provisions of the organic law ; it has been restrained by the habits of thought of the English subjects, by the tremendous power of class interests and prejudices, by a traditionary system which has left its mark upon every public act of the British government.

§ 184. If the English King, with his ancient despotic power, and his present influence as theoretical head of the nation, to whom the allegiance of his subjects is due, aided by the support of a civil and an ecclesiastical hierarchy, has not been able to resist the rising tide of parliamentary progress, how shall the President of the United States, with his limited and defined functions, his liability to impeachment, his responsibility to the people, and his brief term of office, be able to oppose any permanent obstacle to the steady advance of Congress, much less to turn that advance backward and despoil the legislature of their rightful attributes ? The prerogatives once held by the British Crown which he might use against the Parliament, were immeasurably more efficient than any power lodged in the hands of the President, but these have been either directly wrested from him, or they have been so completely abandoned by non-user, that any exercise of them

would be the signal for a revolution. The President cannot coerce the Congress ; the Supreme Court cannot directly interfere with the proceedings of Congress ; but the House of Representatives may impeach, and the Senate may condemn, both President and judges ; and although the Congress may not abolish the national judiciary, they may curtail its functions and reorganize the tribunals. The legislature is, therefore, the most powerful both in the essential nature of its general functions, and in the special capacities which have been committed to it.

§ 185. But Congress has also greater inclination and more opportunities to use and enlarge its power than are possessed by the other departments. This disposition is not peculiar to our own national legislature, it belongs, and must of necessity belong, to all popular assemblies. Whatever motives may act upon a single chief magistrate, impelling him to amplify his field of action, will also act upon each individual legislator. But the single magistrate must be restrained in some measure by the force of public opinion, and by the sense of a responsibility shared with himself by no one ; the responsibility rests upon the legislator with a lessened weight as it is divided between him and all his fellows ; the force of public opinion is broken in his case by its encounter with the whole body of law-makers. That this tendency does exist in a legislature to enlarge its jurisdiction, to encroach upon that of other departments, to usurp power, is proven by the history of the British people ; it is no less clearly shown in our own history, and especially in that of the past few years.

§ 186. I am strongly of opinion that the people of the United States are not in so much danger from an undue stretch of authority by President or by judges, as from unlawful assumptions by Congress. The Constitution is well so far as it goes ; the design was good ; the checks and balances were carefully and skilfully arranged ; but no mere organic law can place a lasting barrier to the advance of a popular legislature. Step by step their powers are exceeded ; the nation acquiesces ; the precedent becomes established ; and a system of construction is finally elaborated which takes the place of the written

Constitution as a practical guide to the government in its official duties.

One power alone can stay the legislature in its gradual march towards the possession of all political attributes, — that of the people. If the people shall always give a life to the provisions of the Constitution, if they shall impart their own force as a constant energy in the complicated machine, their servants and agents may easily be kept within the bounds assigned to them. But without this life and force, the process I have described is sure ; we may regret, but we cannot prevent it.

§ 187. The evils which would result from a substantial concentration of all power in Congress cannot be enumerated. Unless our forefathers were wholly wrong, unless the organic law is framed upon an entire misconception of the needs of a free people, and of the objects of government, the three departments, legislative, executive, and judicial, must be kept separate, independent, co-ordinate. The question of the power to be wielded by the legislature was discussed and settled. If the tendencies of the present day are right, then all the framers of the Constitution, and the people who adopted it, were wrong. Should Congress, as now organized, practically draw all the attributes and functions of government to itself, and reduce the executive and judiciary to a condition of substantial dependence upon itself, the next step would inevitably follow ; and this would be the consolidation of the national legislature into one body. The Senate would be pronounced an unnecessary and hurtful clog upon the free activity of the more popular branch. Even now such a step is publicly advocated. Should this result be accomplished, the liberties of the people would be gone, only to be regained by another revolution. Nothing could withstand a legislature consisting of one house, practically wielding all governmental power, restrained by no checks of organization or function. No tyranny could equal its tyranny.



## SECTION II.

## THE SEPARATION OF THE LEGISLATURE INTO TWO CO-ORDINATE BRANCHES.

§ 188. The second feature in the organization of the government which I shall notice is, the division of the Legislature into two co-ordinate branches, the Senate and the House of Representatives, — the one chosen directly by the people, the other appointed directly by the legislatures of the several states. Art. I. Sec. I. declares that the Congress “shall consist of a Senate and House of Representatives.” Art. I. Sec. II. § 1, says that “the House of Representatives shall be composed of representatives chosen every second year by the people of the several states.” Art. I. Sec. III. § 1, provides that “the Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator shall have one vote.”

Of the advantages and even necessity of this dual arrangement, I do not now intend to speak. The subject is fully discussed in Dr. Lieber’s “Treatise on Civil Liberty,” and in “The Federalist.” This double legislature has approved itself so well that all the states have formed their local assemblies upon the same model.

§ 189. But the framers of the Constitution did not invent this scheme; they had an example ready at hand to imitate; they evidently copied from the British Parliament. Like that the Congress, in its law-making function, truly represents three estates. Not indeed royalty, nobility, and commons; but the President represents the people in their collective, imperial capacity; the Senate represents the same people gathered into their local commonwealths; while the lower House represents the same people as divided into small and single communities. Thus we have all interests united. (The nation, as one body-politic, speaks through the President. The states, as separate political societies, speak through the Senate; the local districts speak each through their own delegates. All varieties of opinions and interests are thus instrumental in moulding the

national legislation. The tyranny of majorities is weakened; all claims may be heard and fairly considered; and a policy suited to the general good of the whole may be evolved from this conflict.

§ 190. And here we see again involved in the formation of our national Congress, the two ideas which were referred to in a former chapter, that of local self-government, and that of centralization, united and balanced in such a manner that neither can destroy, but each may aid and strengthen the other. The provisions of the Constitution which regulate the choice of Senators, and confer the power of selection upon the state legislatures, and yield to each commonwealth an equal voice in the upper House, were the result of a spirit of compromise. So tenacious were the states of this equality that an express restriction upon the power of amendment is inserted in the Constitution; it cannot be destroyed without an unanimous consent.<sup>1</sup> Thus have we fast anchored in our fundamental law the principle of local self-government. While we recognize the nation, while we glory in our unity, we have guarded against a central power of such magnitude as to endanger the liberties of the citizen. To a popular branch of the legislature, fresh from contact with small constituencies, frequently elected, partaking of the momentary passions and errors of the people, and therefore endeavoring to reflect their immediate wishes, is joined the more conservative Senate, fewer in numbers, with longer duration of office, appointed by the legislatures, and therefore somewhat removed from the fitful flow of the popular will. One house is the force which drives, the other the anchor which holds fast; one is the instrument of progress, the other tempers the vehemence of advance; one communicates speed, the other steadiness. Yet as each is finally responsible to the people, and draws its inspiration from the same source, the Senate is not, like the British House of Lords, the representative of class interests and of privileged orders. It does not interpose itself as an obstruction to all progress, hindering the onward march by the mere force of passive resistance. It is conservative be-

<sup>1</sup> Const. Art. V.

cause it has the opportunity to be calmer and more deliberate, to look beyond the present, to study the effect of measures upon the future.

§ 191. When we turn from the Senate to the more numerous and popular branch, the question meets us, how are the members to be apportioned to their constituents; according to what ratio shall they be allotted among the several states. As the principle of local self-government had been preserved in the organization of the Senate by giving each commonwealth an equality of representation, so after some struggle the principle of centralization, the idea of an empire, triumphed in constructing the lower House. All state equality is here abandoned, and the members are to represent either property or population. But it was perceived that any definite distribution which should be made at the time when the Constitution was adopted, and which might then be just and equitable, would, probably, as years passed by, and the nation developed in resources, become extremely unfair and one sided. Some rule must, therefore, be established which would hold good for all subsequent generations; by which the representation might be rearranged from time to time whenever a necessity should require.

§ 192. It was easy to determine that the number of delegates given to each particular state should be ascertained by the amount of the population, and not by the amount of property. It was therefore provided that at the outset each state should be entitled to a certain definite number of representatives; that the number of representatives should never exceed one for every thirty thousand; but that each state should always have at least one delegate; and that as the basis of the subsequent apportionment, an enumeration of inhabitants should be taken within three years after the first meeting of Congress and at intervals of ten years thereafter.<sup>1</sup>

§ 193. But in fixing upon the exact basis of apportionment by means of this census, a difficulty presented itself so great that it could only be evaded by a compromise. Had the inhabitants of the states been all freemen no such difficulty could

<sup>1</sup> Const. Art. I. Sec. II. § 3.

have arisen ; but most of the original thirteen states contained a mixed population of freemen and slaves, and in the Southern States the latter class bore a large proportion to the former. Should these slaves be reckon'd as persons in determining the number of inhabitants in a state for the purpose of ascertaining how many delegates that state should send to the national Congress? On the one side it was urged that slaves were property, and therefore not to be included in the aggregate of population ; on the other hand it was replied that slaves were actual persons, and were as much entitled to be represented as women and minors and all others who are forbidden to exercise political rights. This contrariety of opinion on so vital a question could only be arranged by a compromise, and it is thus that the Constitution settled the difficulty.

“ Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.”<sup>1</sup> The term “ free persons ” includes all inhabitants of every age, sex, and color who are not in a condition of slavery, except Indians not taxed ; “ all other persons ” is the constitutional euphemism for slavery.

§ 194. During the continuance of slavery this rule of the Constitution resulted in giving to the Southern States a far larger representation in Congress than would have been due simply from the number of freemen in those communities, and thus greatly added to the power of the ruling class at the South. For the slaves were, to all intents and purposes, property, made so by the state laws, and no more appropriate to be taken as the basis of an apportionment, than the cattle and horses of the Northern farmer. ( The claim that, being actual persons, they were to be regarded as in the same condition as women and minors, was plainly fallacious. ) Women and minors, though having no political capacities, are clothed with all civil rights, rights for whose protection governments are

<sup>1</sup> Const. Art. I. Sec. III. § 3.

instituted. Slaves have no such rights; as members of the society they are completely swallowed up in their masters; even the laws for their personal safety are rather enacted in the interests of the masters, to protect their property. As the slaves could not, under any supposable circumstances, exert the slightest influence in the actual choice of legislators, the Southern freeman, while voting on behalf of a fraction of his slave population, was just so far out-voting his Northern fellow-citizen.

§ 195. This preponderating influence may be increased in the future rather than diminished. An amendment to the Constitution has abolished slavery, and the bondmen have become free. There are now no more "other persons" to whom the constitutional provision can apply. Representatives must be apportioned equally over the whole country. The same number of free citizens in every part of the Union will now speak through the voice of every delegate to the national Congress. This will immediately increase the number of Southern representatives in the lower House; for the total representative population of a state will no longer be ascertained by adding to the number of freemen three fifths of the slaves, but by adding to the former freemen the whole of the former slaves. This result will be unobjectionable if the vast aggregate of persons thus suddenly raised into the status of freedom and taken as the numerical basis of apportionment, can have any actual voice, can exert any positive influence in the choice of representatives. If this power be not conferred upon them, the former governing classes at the South will have received an accession to their political importance; the balance will be even more inclined in their favor. In no other portion of the country will there be such an enormous number of free persons, who, by state laws, are deprived of all active co-operation in the management of the government, and yet who are reckoned as persons that must be fully represented in the Congress of the nation.

§ 196. This result was probably overlooked at the time when the amendment abolishing slavery was adopted. Various plans are now suggested to evade it. A second amend-

ment is proposed changing the basis of representation, and providing, in substance, that the apportionment be made according to the number of those persons in each state who, by state laws, are declared to be electors. The number of delegates in Congress would then depend upon the number of those who are clothed with the capacity of voting; and a state would obtain a larger influence in Congress as it extended wider the electoral franchise among its inhabitants. The adoption of such an amendment would, doubtless, indirectly compel the several state governments in time to confer the right of voting upon negroes. A second plan assumes an amendment either defining in terms the qualifications of electors, or empowering Congress to define them. These changes would affect the entire country. A third measure applies alone to those Southern States which declared themselves separated from the Union, and consists in requiring, as a condition to a complete restoration to their political rights, that they should severally provide in their fundamental laws for conferring the electoral franchise upon negroes. I purpose, in the sequel, to offer a few observations upon these plans, and therefore pass them by, at present, with this simple statement.

### SECTION III.

#### METHOD OF CHOOSING OFFICIAL PERSONS.

§ 197. *General Features.* — A third element in the organization of the government to which our attention should be directed, is the method of choosing those persons to whom the labor and duty of administering the public affairs are intrusted. When we examine the provisions of the Constitution we are struck with the fact that among the thousands of officials who may be needed to carry on the operations of the national government, only one small class — the members of the House of Representatives — are to be elected directly by the people. Amid the general acceptance of the modern doctrine that the right of suffrage is almost an essential attribute of citizenship, and while the tendency has, for many years, been to extend,

and not to contract it, this element in our organic law stands out in bold contrast to the practice of most of the states in the management of their domestic concerns. Indeed, our fathers, who framed and adopted the Constitution, though sternly republican, had not yet conceived the idea that the people were to interfere directly in the choice of all rulers. Their scheme of giving effect to the popular will was through the means of delegation. The people were to speak once in the selection of certain officials; and these representatives were afterwards to be the mouth-pieces of their constituents. This principle runs through the whole Constitution; and it was applied even in the first adoption, and in any subsequent ratification of amendments.

§ 198. *The President and Vice-President.*—Article II. Section I., as amended in Article XII. of the Amendments, provides for the choice of President and Vice-President as follows: “Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress. The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President.” . . . [The ballots are to be counted by the President of the Senate in the presence of the Senate and House of Representatives.] . . . . “The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot, the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states

shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

“The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

“The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.”

§ 199. How these electors may be appointed, whether directly by the people, or by the state legislatures, or otherwise, the Constitution does not assume to determine. It leaves the settlement of that matter entirely to the several states. There need be no uniformity in their practice; in fact, until recently there never has been. Formerly the method of choosing by the state legislatures was common. At the present day the choice is made by the body of voters in all the states.

§ 200. What was the idea contained in these constitutional provisions? Was it that the people were to be directly instrumental in the selection of their chief executive officers? Plainly not. The scheme is complicated, and seems to have been contrived expressly to prevent what is often called the tyranny of majorities. Even now, when the college of electors is chosen by the body of voters, it is possible that a person shall receive the ballots of a large majority of the presidential electors, while a majority of the actual voters have preferred another candidate. In fact, the people of the United States, as one collective aggregate, are not appealed to in the selection of the President, but that people as segregated into their



local commonwealths. The idea of original state equality and sovereignty has here left its impress upon the organic law. When, therefore, we hear, at the present day, a complaint that a person may be the President of the minority, it should be remembered that this fact is the result of a concession to the demands of state independence, which were insisted upon with so much pertinacity when the Constitution was framed and adopted. In those clauses which provide for an election by the House of Representatives, this idea of state sovereignty is absolutely controlling; the old feature of state equality in the legislature is expressly preserved.

§ 201. But aside from the influence which the theory of state independence and sovereignty exerted upon these provisions of the organic law, the whole scheme assumes that the people were not to interfere directly in the selection of their chief executive officers. "By the theory of the Constitution, the evident intention of its framers, and the early practice, it was not designed that the President and Vice-President of the United States should be directly or indirectly voted for by the people in such a manner that a citizen, casting his ballot, should be understood as designating any particular person for either of these offices. Their choice was to be removed from the excitement and distractions of popular elections, and was to be intrusted to the cool and deliberate judgment of a few special electors appointed for that purpose by the several states in such manner as their laws should prescribe. These special electors were assumed to enter upon the discharge of their functions, untrammelled by any pledges, and left only to the guidance of their own personal convictions of what were the best interests of the country.

§ 202. "But the rapid spread of the idea of popular sovereignty has swept away these checks planned by the founders of the government, so that while the letter of the Constitution is strictly obeyed, its intention is directly violated in the election of the chief magistrate. This has been accomplished by the abandonment of the choice of the electors to the people of the several states, and by the closely drawn lines of party discipline; so that sets of electors, unequivocally pledged to a

particular candidate, and directly voted for by the people, have become, in fact, the mere passive instruments of the majority of voters in each state, in carrying out their will as expressed at the ballot-box. The electoral college is thus reduced to a mere machine, a mere conduit through which may flow the stream of popular suffrage. We do now, in fact, vote for the President and Vice-President as really as though their names were inscribed upon the papers we deposit. We have thus, in this respect, virtually made to ourselves a new constitution, which exactly resembles the original in form, but is vastly different in substance. This complete change in the manner of electing the President is a remarkable instance of the way in which written laws and constitutions, however carefully guarded, may be made to yield to a change in the popular feelings and wishes; so that, while not a clause is repealed or modified, the effect of the whole is entirely transformed. On the letter of the Constitution there has grown up an unwritten law, not, indeed, enacted by courts, but devised and voluntarily obeyed by those who manage the machinery of popular elections.<sup>1</sup>

§ 203. I would not return to the ancient theory. I am persuaded that our fathers had not faith enough in the intelligence of the people. I believe that the whole body of voters is less liable to err in the choice of those rulers whose functions are political, than any small and select number of men specially appointed, however pure and patriotic they may be. I believe that our general elections fairly express the popular will, and that the decision is, on the whole, in accordance with the best interests of the nation. We might well, therefore, abandon the idle and useless form of interposing the machinery of an electoral college between the people and their choice, and allow the votes to be cast directly for the persons designated to the offices of President and Vice-President. I have called this form idle and useless; it certainly is so, unless it be purposely retained as a check upon the power of a majority. If it be thought best that a majority of voters in the United States should not necessarily determine the selection of President,

<sup>1</sup> See Pomeroy's *Introduction to Municipal Law*, § 731.

then this expedient of an electoral college is well contrived to thwart the wishes of such majority. But all this is entirely opposed to the tendencies of the age, and to the principles upon which the state governments are organized and administered. There are theorists who have suggested plans by which minorities may be the more efficiently represented; but no one has, as yet, contended that, in a republican form of government, the minority should possibly control.

§ 204. *The Senate.* — Article I. Section III. provides that “the Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.”

Provision is made for classifying those who are first chosen, so that the terms of office of one third shall expire every second year. “If vacancies happen by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies.”

The same Article, Section IV., declares that, “the times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.”

The body which appoints the Senators is fixed beyond the reach of Congress or state legislation, — the legislatures of the respective states. The places of choosing are also fixed, — the place where each legislature, by the local law, is to hold its sessions. The times and manner of holding elections are left to the states, unless Congress should, by a general law, prescribe some common rule. Congress has not availed itself of this power so plainly conferred upon it by the Constitution, and there is some diversity in the manner of choosing Senators among the different states. In some the two houses meet in joint session, and a majority of the whole united body is sufficient; in others the houses vote separately, and do not meet in joint session until a majority of each has made its selection,

and then if the choice of both branches has fallen upon the same person the election is complete, if not, a resort is had to a joint ballot.

§ 205. *The House of Representatives.* — The Constitution determines the method of electing members to the lower House in the following manner: — Article I. Section II. § 1, “The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.”

The first paragraph of Section IV. of the same Article, cited in § 204, applies to the election of Representatives as well as of Senators.

In this connection may be read Section IV. of Article IV. as follows: “The United States shall guarantee to every state in this Union a republican form of government.”

§ 206. As to the times, places, and manner of holding elections of Representatives, the Congress has complete control, so far as positive provisions of the Constitution do not interfere; in the event that Congress does not exercise its authority, the states have a like complete control. Thus Congress may prescribe the day and month for holding the election, and make them the same throughout the country, with the limitation that the election must be once in two years. Congress may also prescribe whether the choice shall be by single districts, or by a general vote in each state; and may, no doubt, divide the states into congressional districts. The national legislature has not, however, exercised the full power conferred upon it, and most of the regulations governing the choice of Representatives have been left to the separate states. Over the qualifications of the electors, Congress has no control further than may be included in the clause by which the United States is to guarantee a republican form of government to each state.

§ 207. Here we perceive that the general government has no voice in deciding who shall be privileged to vote for Representatives in Congress. The whole subject is controlled by

state laws. The states will, of course, in their own constitutions or statutes, declare which of their inhabitants may take a part in choosing members of the popular branch of their local legislatures, and such persons are entitled also to vote for congressmen in that state.

We are thus met by this peculiarity of the organic law, that it nowhere attempts to define what persons may exercise the right of suffrage, nor does it confer upon the general government any such power. In the only instance where provision is made for a popular election, the states are left to designate the individuals who may unite in electing.

§ 208. This fact is a complete answer to the somewhat common notion that United States citizenship implies the right of voting. Nothing can be further from the truth. Not a vote is cast, from one end of the country to the other, by any person in virtue merely of his being a citizen of the United States. The Constitution recognizes the status of citizenship, and provides for admitting foreigners to that condition; but it does not create any class of voters. What the several states may do in this respect, is a matter entirely for their own consideration. It is true, as a fact, that, by the state laws, the great mass of voters for Representatives in Congress are white male citizens of the United States, who have attained the age of twenty-one; but there is no necessity in the Constitution for this practice. A state may deny to some citizens the right of suffrage entirely, as most do to the free negro, and all do to women and minors; or may deny it to persons of foreign birth for a certain period after naturalization, as does New York. Others still may confer the privilege upon persons who are not citizens of the United States, as do a few of the Western states.

§ 209. It is plain, therefore, that mere citizenship of the United States does not involve the right of suffrage. It is also plain that the United States have no power or authority to interfere with the discretion of the states in determining what class of persons possess the "qualifications" for electors. The state laws may throw open the door as wide as possible, or may place any limitation which is not inconsistent with a re-

publican form of government. In some, a property qualification has been demanded from the voter, and this practice was almost universal in the earlier years of our government; in a few, a literary or educational qualification is required. In a small number of commonwealths, free negroes are admitted on an equality with whites; in others, only those who possess a certain amount of property; while in most they are rejected altogether.<sup>1</sup>

§ 210. Notwithstanding the control over this subject which the Constitution gives to the states is so great, so nearly absolute, it is limited by Art. IV. Sec. IV. which says that the United States shall guarantee to every state a republican form of government. It seems to be evident that a state, under pretence of prescribing qualifications for electors, might place the governmental power in the hands of an oligarchy, and might erect such a political fabric as was in no respect republican in form. Should this be done, Congress might undoubtedly interfere in that particular state, and restore a republican form. But to say that Congress may decide by a general rule what regulations governing the status of electors are consistent with the existence of a republican form of government, and may pass laws imposing those regulations upon the several states, is to ignore and destroy not only the spirit, but the very letter of the organic law. To say that a republican form of government implies universal suffrage, or that it forbids the imposition of qualifications which do not directly affect the voter's capacity to judge properly of his political act of voting, is to violate all the fundamental rules of interpretation, to blot out all history, to declare that even the government of the United States is not republican.\* The plain common sense view which the people have always taken of these provisions is the correct one. The clause "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature" has been uniformly

<sup>1</sup> I hardly need say that I am speaking here of those states alone which remained true to the Union, and which have voluntarily acted upon the question of suffrage; I do not include those states which attempted to secede, and upon which Congress is now imposing universal suffrage.

construed to mean that the states may decide who of their inhabitants shall vote ; and it has been left to the good sense of the people of each commonwealth to enlarge the class of voters from time to time as the ideas of popular sovereignty obtained more power.

§ 211. It is certainly, however, an anomaly that the general government of the United States should have no control over the choice of its own delegates in Congress ; that it should be powerless to define the qualifications of congressional electors. It must be conceded that this is a defect in our organic law which needs amendment ; it was an unnecessary and unfortunate concession to the theory of state sovereignty and independence. One code of rules should certainly prevail throughout the country to regulate the choice of representatives, and this should be the work of Congress, or of the people in its sovereign capacity. The nation should dictate in the selection of its own legislators. The integrity of the separate states is sufficiently guarded by allowing to each an equal voice in the Senate, and by permitting them to appoint Senators, and to control the selection of Presidential electors ; the more national branch of Congress, that which comes directly from the people, should be entirely under the management of the one body politic which is represented in the general government.

§ 212. Here I wish to offer a few considerations upon the curious result of the amendment abolishing slavery referred to in §§ 195, 196, and upon the second amendment proposed to obviate that result. This latter amendment which has passed both houses of Congress, and been ratified by several state legislatures, is as follows: Art. XIV. Sec. II. "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way

abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

There can be no doubt that the amendment, when adopted, would have the effect to extend the right of suffrage to the class of new-made citizens in the Southern states, and to free negroes in other states, and thus to increase the number of voters for delegates to Congress, by making it directly for the interest of the states to admit the same class of citizens to vote for members of the popular branch of their own local legislatures, and for other state officers.

§ 213. While this plan would, therefore, tend to accomplish the object designed, it would do so by a violation of ideas and principles which are wrought into the very fibre of our government. In regard to matters purely local, and which do not and cannot have a national aspect or influence, it has been the policy of the United States not to interfere with the separate states. The Constitution was framed upon this idea. The people, as the source of all power, gave to their central government exclusive control over all subjects which are national and imperial, and to the separate states a control over all subjects which are local. I deem this policy as essential as is its counterpart, that the several states shall not interfere with the nation in the administration of its appropriate functions. Now the determining who may vote for members of the state legislatures, and for other state officers, is a matter peculiarly local, and the United States should not be able, either directly or indirectly, to dictate rules thereon to the various commonwealths. But, on the other hand, the determining who may vote for Representatives in Congress is a matter purely national, and the several states should not be permitted to dictate rules thereon to the general government.

§ 214. A remedy, therefore, should be proposed, which would not interfere with functions strictly belonging to the states, but would restore to its own control functions that of right belong to the nation. Such a remedy would be an



amendment, not of the clause apportioning representatives, but of the clause relating to the qualifications of congressional electors. An idea might be borrowed from the seceding states themselves and extended to its legitimate results. When the constitution of the so-called Confederacy was formed, the convention perceived the impropriety of permitting the states to have complete power over the choice of congressmen, and although their revolt was based upon an assumed existence of separate state sovereignty, they imposed restrictions upon the discretion of the several commonwealths in the matter of determining who may exercise the right of suffrage.<sup>1</sup> In this single instance their example is worthy of imitation; but I would go further and take away the discretion altogether.

§ 215. The amendment suggested is to Art. I. Sec. II. § 1, of the Constitution, so that it should read substantially as follows: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors shall have the qualifications which Congress may from time to time prescribe, and which shall be uniform throughout all the states." The clause in regard to apportionment may be left as it now stands.

Thus should we remedy any unequal consequences of the amendment abolishing slavery; Congress might extend the right of suffrage among all free persons; and at the same time purely state functions would not be interfered with, while a symmetry would be given to the organic law, which, it must be confessed, is now lacking.

§ 216. *Other Officers.* — All other officers are appointed by the President with the advice and consent of the Senate, or by the President alone, or by the Heads of Departments, or by Courts of Law, (Art. II. Sec. II. § 2), with the exception of the Speaker and other officers of the House, and the President *pro tempore* and other officers of the Senate, which are chosen by those bodies, respectively. (Art. I. Sec. II. § 5, Sec. III. § 5.)

<sup>1</sup> See Appleton's *Ann. Am. Cycl.* for 1861, p. 158. The article in question restrains the several states from allowing persons of foreign birth and not citizens of the Confederate States, to vote for any officer, civil or political, state or federal.

SECTION IV.

SOME RULES RESPECTING THE QUALIFICATIONS OF OFFICERS AND THE ORGANIZATION OF THE HOUSES OF CONGRESS AND THE CONDUCT OF BUSINESS THEREBY.

§ 217. There are certain precise and detailed rules respecting the qualifications of officers, and the organization of the houses of Congress, and the conduct of business thereby, which do not need amplification or comment, but may be arranged in order substantially in the terms used by the Constitution itself.

1. *Qualifications in respect to Age, Citizenship, and Inhabitaney.*

The President and Vice-President must be natural-born citizens, at least thirty-five years of age, and not both inhabitants of the same state. Art. II. Sec. I. § 5; Art. XII. of the Amendments, § 3.

Senators must be at least thirty years of age; if of foreign birth and naturalized, must have been citizens for at least nine years; and must be inhabitants of the state from which they are elected. Art. I. Sec. III. § 3.

Representatives must be at least twenty-five years of age; if of foreign birth and naturalized, must have been citizens for at least seven years; and must be inhabitants of the state from which they are elected. It is not required that they should be inhabitants of the district from which they are chosen. Art. I. Sec. II. § 2.

2. *Terms of Office.*

The President and Vice-President, four years. Art. II. Sec. I. § 1.

Senators, six years. Art. I. Sec. III. § 1.

Representatives, two years. Art. I. Sec. II. § 1.

§ 218. Certain regulations respecting the organization of Congress, and of each House.

There are a few special rules which apply to the Congress as a legislative body; others apply to each house by itself; and others still to the members of each house individually.

The Congress, as such, shall assemble at least once in every

year, and the day of meeting shall be the first Monday in December, unless they shall, by law, appoint a different day. Art. I. Sec. IV. § 2.

Under this provision Congress may appoint two or more sessions for one year, and may set any day for the commencement of such sessions.

§ 219. *Rules applicable to each House separately.*— In respect to the matters involved in these rules each house acts independently of the other, and these acts are not laws in any true sense of the term. It may be doubted whether Congress could, by any law, bind either house in regard to these subjects which are thus committed to the discretion of each branch of the legislature.

Each house shall be the judge of the elections, returns, and qualifications of its own members. A majority of each shall be a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members. See Art. I. Sec. V. § 1.

The power given to the Senate and to the House of Representatives, each to pass upon the validity of the elections of its own members, and upon their personal qualifications, seems to be unbounded. But I am very strongly of the opinion that the two houses together, as one Congress, cannot pass any statute containing a general rule by which the qualifications of members as described in the Constitution, are either added to or lessened. Such a statute would not seem to be a judgment of each house upon the qualifications of its own members, but a judgment upon the qualifications of the members of the other branch. The power is sufficiently broad as it stands; indeed there is absolutely no restraint upon its exercise except the responsibility of representatives to their constituents. Under it the House inquires into the validity of elections, going behind the certificate of returning officers, examining witnesses, and deciding whether the sitting member or the contestant received a majority of legal votes. The House has also applied the test of personal loyalty to those claiming to be duly elected representatives, deeming this one of the qualifications of which they might judge. The Senate has also passed upon the valid-

ity of the election of a Senator by the legislature of his state, determining whether the choice had been made in accordance with the state law. This body has also inquired into the loyalty of a member, and has expelled Senators for alleged treasonable or seditious practices.

§ 220. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds expel a member. Art. I. Sec. III. § 2.

Under these provisions each house has the entire control over its own parliamentary proceedings, its methods of doing business, its rules of order, the observance of order on its floor, and the conduct of its members. The power of expulsion is unlimited, and the judgment of the two thirds majority is final.

§ 221. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Neither of these provisions requires any remark, except that giving one fifth of the members present the power to demand that the yeas and nays on any question shall be entered on the journal. This regulation, simple in itself, is most important and salutary. It is a safeguard against the acts of a reckless or corrupt majority. By placing in the hands of so small a minority the power to demand the yeas and nays, and to make a lasting record of all votes, which shall go before the people, it keeps each member alive to his personal responsibility to his constituents, and effectually prevents all subsequent concealment as to acts for which he may be called in question.

§ 222. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose, or concur with amendments, as on other bills. Art. I. Sec. VII. § 1.

This provision is substantially copied from the British Constitution. No principle is more firmly settled in the administration of the British government, than the doctrine that the Commons holds the purse. This power of the House of Commons to grant or withhold supplies has been contended for during centuries of conflict; it has been the instrument of success in every contest with the royal prerogative; it has finally raised the Commons to a position of absolute supremacy above all other departments of the government. And yet there does not seem to be any good reason for importing it into our Constitution. The whole frame of our government, the whole state of our society is so different from that of England, that there is no class distinction, no permanent conflict of interest between the House of Representatives and the Senate; there is no reason why the lower house should be more careful of the public moneys, and more economical in the public expenditures than the Senate. The constituents which both represent are finally the same, and together bear the burdens of taxation. I believe the opinion is becoming general that the provision in question is not only useless, but is an absolute hindrance in the course of legislation.

§ 223. *Rules applicable to the members of the two Houses individually.* — The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place. Art. I. Sec. VI. § 1.

The privilege from arrest, and from being questioned in any other place for any speech or debate, has ever been considered indispensable to a free representative government. These provisions in our Constitution are substantially the same as those of the English law.

§ 224. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under

the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time ; and no person holding any office under the United States shall be a member of either house during his continuance in office. Art. I. Sec. VI. § 2.

The latter of these clauses is in striking contrast with the law and practice in England. As Parliament is organized the principal administrative officers must be members of one or the other house.

## CHAPTER III. •

### GENERAL LIMITATIONS UPON THE POWERS OF THE UNITED STATES GOVERNMENT.

§ 225. THUS far, in the course of this work, I have endeavored to explain what the Constitution is, and who were its authors; then passing from this general survey to the instrument itself, have exhibited the fundamental ideas upon which the government of the United States is based, and described its outward form and structure. We now proceed to consider its powers. In explaining and illustrating the positive powers which are conferred by affirmative language of the Constitution, the natural order requires us to take up separately the Legislative, the Executive, and the Judicial. But before commencing this special investigation, there are some considerations to be submitted which affect the whole government, which apply to all departments alike.

§ 226. As has already been stated more than once, the government of the United States is one of limited powers. The people have not committed to it their own complete functions of legislation and administration. One portion they have retained dormant in their own hands; special capacities and attributes they have conferred upon the national government; the residue they have intrusted to the separate states. In order to confine their immediate agents within the proper bounds, the people have inserted in the organic law various restrictions, stated with the utmost care, so that the rights of the individual shall be guarded from the encroachments of power.

Let us now direct our attention to the limitations upon the governmental power; let us endeavor to ascertain their nature, and the extent of their negative influence.

They are of two classes. 1st. Those which are expressed in the Constitution in positive terms; and 2d. Those which are implied from the general nature of the government, and the design of the instrument by which that government is created.

## SECTION I.

## EXPRESS LIMITATIONS UPON THE WHOLE GOVERNMENT.

§ 227. We are to examine those restraints and limitations which are imposed upon the general government and are embodied in express negative language of the Constitution. An examination of the various provisions of the organic law will disclose the fact that most of these express negative clauses apply with equal force to the Legislature, the Executive, and the Judiciary. Some, however, are confined in their operation to a single one of these departments, generally to Congress. These latter will be passed by for the present, and will be examined in those subsequent chapters which treat of the legislative, administrative, or judicial functions.

*General Statement and Nature of these Limitations.*

§ 228. The Constitution, as proposed by the convention and adopted by the people, contained almost none of the express, general, negative provisions which impose a limit upon the entire functions of the government. This omission of a Bill of Rights was made one of the strongest grounds of objection to that instrument during the canvas which preceded its final ratification. To meet this objection, it was urged by the authors of "The Federalist" and others, that our whole Constitution was in itself a Bill of Rights; that no arguments drawn from English history would apply to our condition; that while the Parliament of Great Britain could do every thing, our own government had only those attributes which were granted to it; and that a denial of express powers not formally conferred, would be idle and absurd. These arguments, however, did not carry conviction, and immediately after the



assembling of the new Congress, amendments were proposed and speedily ratified, which consist in a series of negations of any assumed power to perform certain enumerated acts. These express denials of the existence of certain attributes in the general government, constitute our national bill of rights, and apply to each department, and to all classes of officials. They are contained in the first eight articles of the amendments.

§ 229. The following is the substance of these important restraints.

No form of religion shall be established, nor shall the free exercise of religion be prohibited. The freedom of the press or of speech shall not be abridged. The right of the people peaceably to assemble, and to petition the government shall not be curtailed. Art. I.

The right of the people to bear and keep arms shall not be infringed. Art. II.

Soldiers shall not, in time of peace, be quartered in houses without the consent of the owners, nor in time of war, except in the manner prescribed by law. Art. III.

Unreasonable searches and seizures of persons, houses, papers, and effects are forbidden. No warrant shall be issued except upon probable cause, supported by oath, and particularly describing the place to be searched, and the persons or things to be seized. Art. IV.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. No person shall be subject, for the same offence, to be put twice in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. Art. V.

In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed; and must be informed of the nature and cause of the accusa-

tion ; and must be confronted with the witnesses against him ; and may have compulsory process to obtain his own witnesses ; and may have the assistance of counsel in his defence.  
Art. VI.

The trial by jury shall be preserved in suits at common law, where the value in controversy shall exceed twenty dollars.  
Art. VII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Art. VIII.

§ 230. The separate states have also adopted constitutions which contain these or similar limitations upon the local governments. It is a fact, therefore, that the entire legislative and administrative power of the whole country, whether wielded by the nation or by the states, is subject to restraints of the same general nature as those expressed in these clauses, and the rights and liberties of the people are guarded at all hands against encroachments from any source, as much as is consistent with the safety of the nation. It is true that the same construction may not be given to a provision identical in language, in all the states ; the same exercise of governmental power may be regarded in one commonwealth as in accordance with, and in another as opposed to, the Bill of Rights which forms a part of both constitutions. This is a result which must flow from the delegation of functions to bodies politic that are in a measure independent of each other.

*To whom are these negative Provisions addressed ?*

§ 231. The first inquiry which suggests itself, and which I shall proceed to answer, is, upon whom are the provisions of the United States Constitution just quoted, binding ; to whom are they addressed ? They are expressed in the most general language ; do they therefore restrain the states as well as the nation ? or are they only applicable to the latter ? This question has not often arisen in a practical form, for as the state constitutions, with few exceptions, have contained the whole of these muniments of individual liberty, their legislatures have

been restrained by their own organic laws, if not by that of the nation. But the question may easily assume a very practical form and become of paramount importance. A state whose constitution contains limitations similar to those found in the fundamental law of the nation, may, through its legislative, administrative, and judicial departments, put an interpretation upon these provisions which is oppressive to its own inhabitants and destructive of their liberties. Could these inhabitants appeal to the national authorities, and bring these negations of the national Constitution to bear upon the local government?

Or the state may abolish these restrictions in its own organic law, and, so far as itself is concerned, leave its government free to act at pleasure. There is certainly a growing feeling that the methods of administering justice both in civil and criminal cases, which we have borrowed from our English ancestors, are too cumbersome, and are as often hindrances as helps to the right. It has been suggested that the interests of the public would be advanced by abolishing the grand jury, and trial by jury, and introducing the more severe methods which are used in the continental nations of Europe. If public opinion in any state should become ripe for such a change, could that state so amend its own constitution as to abolish all of this time-honored procedure, and allow a person to be held to answer for a capital or otherwise infamous offence, without a presentment or indictment of a grand jury? Could the state deprive the accused of the trial by jury, or compel him to be a witness against himself? Could the state take the private property of its inhabitants without making just compensation? or deprive them of life, liberty, or property, without due process of law? or impose excessive fines, or inflict cruel and unusual punishments? Some of the assumptions contained in this series of questions may well be called impossible; but others are certainly within the range of probability.

§ 232. The answer is that the general limitations contained in the United States Constitution, and which have been quoted, have reference only to the national government, and do not apply to the several states. They were not intended

as restrictions upon the powers of the local commonwealths, but only upon the various departments which administer the public affairs of the entire nation, and which were created by the organic law. So far, then, as the states do not infringe upon express provisions in the Constitution specially addressed to them, or upon those implied in the whole scope of that instrument, and in the grants of power to the general government, they may regulate their own internal economy as seems best to themselves. The United States are forbidden either by the legislative, executive, or judicial departments, to deprive a person of any of the immunities and privileges guarded by the Bill of Rights. The states may, in respect to their own inhabitants, if consistent with their own organic laws, infringe upon them all.

§ 233. This construction of the Constitution is supported by the judgments both of the national and the local courts. In the case of *Barron v. The Mayor of Baltimore*<sup>1</sup> the Supreme Court of the United States gave an authoritative interpretation to these clauses. The facts, it is true, applied only to one provision, — that which forbids the taking of private property for public use without just compensation. The plaintiff claimed that the city of Baltimore had taken his property for public use without just compensation, and that a statute of the Maryland legislature authorizing the act was void as being opposed to the negative clause of the United States Constitution already quoted. The reasoning of the court is equally applicable to all these general provisions of the Bill of Rights. C. J. Marshall says: “The plaintiff contends that the case comes within that clause of the fifth amendment to the Constitution, which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state as well as that of the United States. The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own

<sup>1</sup> 7 Peters' R. 243.

government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers to be conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons, and for different purposes. If these propositions are correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions upon their respective governments, as their wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest."

§ 234. The interpretation thus formally given by the Supreme Court of the United States is authoritative and final, and it has been repeatedly confirmed by the judgments of state tribunals. In New York it was decided by the Supreme Court in the case of *Murphy v. The People*,<sup>1</sup> that a statute of that state, providing for the summary trial and conviction of a person charged with petty larceny, not being opposed to the local constitution, was not controlled by any of the amendments to the United States Constitution. In the case of *Barker v. The People*,<sup>2</sup> the subject was considered and decided by the Court of Errors—then the tribunal of last resort—of the same state. Barker had been indicted and convicted for the offence of sending a challenge to fight a duel. The punishment awarded by the statute was, that the party so convicted "shall be incapable of holding, or

<sup>1</sup> 2 Cowen's R. 815.

<sup>2</sup> 3 Cowen's R. 686.

being elected to, any post of profit, trust, or emolument, civil or military, under this state." The defendant insisted that this statute was in derogation of that clause in the amendments to the United States Constitution, which forbids the infliction of cruel and unusual punishments. The court arrived at the conclusion that the provision in question only regulates the legislative and judicial action of the United States, and has no application to the punishment of crimes against a state. The same doctrine has been held by the Supreme Court of Pennsylvania in *James v. The Commonwealth*.<sup>1</sup> It has also been decided in New York and in Connecticut, that the provisions of the amendments, declaring that no person shall be deprived of his property without due process of law, and that in suits at common law, where the amount in controversy exceed twenty dollars, the trial by jury shall be preserved, are restrictive only upon the general government and its officers.

§ 235. The rule of interpretation is thus firmly established, but the rule itself is certainly an unfortunate one. The United States, as the sovereign, as supreme over all state governments, should be able to afford complete protection to its citizens. It is not enough that this protection should be extended to citizens while abroad; it should be as powerful at home. The citizen should be guarded in the enjoyment of his civil rights of life, liberty, limb, and property, against the unequal and oppressive legislation of the states. The rule under consideration, taken in connection with another principle which I will now merely mention, effectually prevents the national courts from maintaining the rights of citizens against the encroachments of the states, so far as those rights are affected by positive restrictions. This second principle was briefly alluded to in § 144. In respect to cases arising under the Constitution and laws of the United States, the jurisdiction of the national tribunals is final and conclusive, and to their judgments the state legislatures and courts must yield. But in respect to cases arising solely under state laws, where the national Constitution is not brought in question, the jurisdiction of the United States courts is not final and conclusive,

<sup>1</sup> 12 S. & R. 220.

and their decisions are based upon, and follow, the expositions of those laws which have been made by the state judiciary.

§ 236. To illustrate: in a case arising under the clauses of the Constitution forbidding a state to pass bills of attainder, ex post facto laws, or laws impairing the obligation of a contract, the Supreme Court would finally and absolutely decide the question whether a given state statute was in fact opposed to these clauses, and would not be bound at all by the opinions and judgments of the state courts upon the same matter in controversy. The national government may thus give its citizens complete protection against the state legislation which is inhibited by these salutary provisions. But in a case arising under the clause in a state constitution which forbids a person to be deprived of life, liberty, or property without due process of law, the Supreme Court of the United States cannot pass directly and independently upon the question whether a given state statute, or a given act done under the authority of the state, is opposed to this clause, but must defer to, and be controlled by, the judgments of the courts of the same commonwealth which have settled the construction given to their own organic law. Here is plainly a vast field open for injustice and oppression by individual states, which the nation has now no means of preventing. Thus, let it be supposed that the constitution of a certain state contains clauses securing to the people the right of keeping and bearing arms; and declaring that no person shall be deprived of life, liberty, and property without due process of law. Let it also be supposed that the legislature of the same state passes statutes by which certain classes of the inhabitants — say negroes — are required to surrender their arms, and are forbidden to keep and bear them under certain penalties; and also statutes by which the same class of persons are required to be hired out and to labor in a certain prescribed manner, and in case of failure to comply with these regulations, these persons are declared to be vagrants, and liable to be seized, and by a summary proceeding, bound out to service for a term of years. An individual of the class mentioned in these statutes incurs some or all of their penalties; is proceeded against. He insists that the stat-

utes in question are opposed to the Bill of Rights in the state constitution; the local courts settle the law against him, and hold that all this legislation is in conformity with the organic law of the commonwealth. Now, this person could obtain no redress from the national courts under the amendments to the United States Constitution which we are considering. Whatever might be the opinion of the judges, they must administer the local law as it has been administered by the local judiciary.

§ 237. This is a result which is dismaying, and a remedy is needed. Such a remedy is easy, and the question of its adoption is now pending before the people. The first section of the proposed fourteenth amendment to the United States Constitution is in these words: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." I consider this amendment to be by far more important than any which has been adopted since the organization of the government, except alone the one abolishing the institution of slavery. It would give the nation complete power to protect its citizens against local injustice and oppression; a power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it. Nor would this amendment interfere with any of the rights, privileges, and functions which properly belong to the individual states. When the Constitution has from the beginning contained prohibitions upon the power of the states to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, it is strange that a provision forbidding acts which deprive a person of life, liberty, or property, without due process of law, was not also inserted at the outset; it is more than strange that any objection can be urged against the proposition to now remedy the defect.

§ 238. The constitutional guaranties contained in the first eight amendments, being thus solely intended as barriers against any encroachments of the general government upon the liberties of the citizen, are binding with equal force upon



the legislature, upon the executive, and upon the judiciary. The will of the people has spoken through their organic law, and the government which they have created, and even themselves who called that government into being, must alike bow to these declarations of right. Furthermore, as the clauses in question are mandatory and peremptory in their nature, and directed at once to each branch of the government, they require no statute of Congress, decision of judge, or act of President, to execute them, and give them binding efficacy. They execute themselves without the aid of an inferior law. Any proceeding of the government in derogation of their command would be void; any proceeding declaratory would be useless.

*Examination and Discussion of these Limitations.*

§ 239. I shall now proceed to discuss, in a brief manner, the meaning and nature of these several restrictions, the objects for which they were incorporated into the organic law, the dangers they were intended to guard against, and the extent of their application. It may be remarked that whatever construction is given to these clauses, will also apply to the same or similar provisions in the state constitutions.

1. The right of the people to keep and bear arms. The object of this clause is to secure a well-armed militia. It has always been the policy of free governments to dispense, as far as possible, with standing armies, and to rely for their defence, both against foreign invasion and domestic turbulence, upon the militia. Regular armies have always been associated with despotism. But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. But all such provisions, all such guaranties, must be construed with reference to their intent and design. This constitutional inhibition is certainly not violated by laws forbidding persons to

carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner. The clause is analogous to the one securing freedom of speech and of the press. Freedom, not license, is secured ; the fair use, not the libellous abuse, is protected.

§ 240. 2. The quartering of soldiers upon private citizens is forbidden in time of peace, and only allowed in time of war when done according to law. This provision is of more historical interest than practical importance. It was borrowed from the Petition of Right, passed by Parliament in the reign of Charles I., under whom the practice of billeting soldiers upon the citizens had grown to be an enormous abuse.

§ 241. 3. Unreasonable searches and seizures are forbidden, and no warrants of search or arrest must issue except upon probable cause, supported by oath, and describing the place to be searched, and the person or thing to be seized.

This provision is of the utmost importance in the administration of justice. It protects the liberty and property of the citizen against the inquisitorial proceedings set in motion by mere suspicion or surmise. It demands some proof to substantiate a charge before the machinery of the law is set in motion, and requires that some person shall assume the responsibility of sustaining the charge by his oath. It prevents all vague accusations by insisting that the person or thing to be seized, or the place to be searched, shall be particularly described.

This clause of the Constitution was particularly aimed at what were known in the English law as general warrants. These general warrants were used more especially in the case of political offences, and were issued by the government, directing the officers to search all suspected places, and seize all suspected persons, without describing any place or person. The execution of the warrant was left to the caprice of the individual who had it in charge. Although these warrants were so plainly contrary to the spirit of the English common law, and destructive of individual rights, and liable to become instruments of tyranny in the hands of an unscrupulous official, they continued in use down to a time immediately prior to the

American Revolution. The practice was finally declared illegal by the Court of King's Bench during the presidency of Lord Mansfield, in the case of *Money v. Leach*.<sup>1</sup> The case arose on a warrant issued by one of the Secretaries of State requiring the officers "to make diligent search for the authors and publishers" of a certain seditious libel, "and them or any of them having found, to apprehend and seize, together with their papers."

§ 242. 4. The course of proceeding in criminal trials for all offences except those of a petty character, is established: an indictment or presentment by a grand jury as the initiative; a speedy and public trial of the accusation by a jury; information as to the nature of the charge; public examination of the witnesses for the prosecution in the presence of the accused; opportunity for the prisoner to procure his own witnesses; to maintain silence respecting the imputed crime, and to be defended by counsel.

It is thus that the Constitution endeavors to protect the liberties of the citizen against any oppressive acts of the government, by absolutely prohibiting that government, through its officers, from deciding first, whether a person shall be put upon trial for an alleged offence, and secondly, whether he is guilty of the offence which may be alleged against him. Both of these questions must be determined by bodies of men chosen from the people at large. The grand jury as the accusers, and the petit jury as the judges of the fact, are a part of the English system of administering justice, and have been thence borrowed by us. No doubt they have been greatly instrumental in maintaining the liberties of the British subject. It may well be questioned, however, if the grand jury is not now so cumbersome and inefficient, that any theoretical advantages which may flow from it, are not far outweighed by the practical defects and hindrances which are inseparable from its use in administering the criminal law. Indeed, it has been already abolished in some states. I am strongly of the opinion, also, that some others of these time-honored principles of English and American criminal procedure have outlived their usefulness, and are

<sup>1</sup> 3 Burr. R. 1742.

obstacles to the proper investigation and punishment of crime. The provision that no person shall be compelled to be a witness against himself can only be supported by that intense reverence for the past which is so difficult to be overcome. This ancient rule of the English law has been entirely repudiated in civil cases, and there is no reason for preserving it in criminal trials. A judicial trial is in theory, and should be in fact, a means of ascertaining the truth; but this maxim of the law closes at once the most direct and certain road which leads to the truth. There can be no doubt that the states will gradually abandon this provision, and reject it from their constitutions.

§ 243. The fifth amendment excepts from its operation a class of cases; and this exception applies in fact to the whole course of criminal investigations as regulated by the Bill of Rights. These cases are those "arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." It is evident that the navy and regular army, at all times, and the militia when in actual public service, cannot be governed by the code of laws which applies to the great body of citizens. Military exigencies require, not individual liberty, but subordination, obedience. The very rules which are framed to protect the individual rights of the people, would destroy an army. The Constitution, therefore, gave Congress the power to make rules for the government of the land and naval forces, and of the militia employed in the service of the United States.<sup>1</sup> These rules constitute that department of the municipal law known as the "Military Law;" and the methods of trial and punishment are military in their character.

§ 244. 5. No person shall be twice put in jeopardy of life or limb for the same offence. The same guaranty is contained in most or all of the state constitutions; indeed, the general maxim which includes this particular case, is as old as the common law. I shall not attempt to quote or comment upon the many cases which have given a construction to this clause. The rule which is settled by them all is, that a person shall

<sup>1</sup> Const. Art. I. Sec. VIII.

not be tried a second time for the same offence after a verdict of conviction or acquittal has passed upon him. But this rule must be taken with the following exceptions: After acquittal the state, or the United States, cannot procure the case to be reviewed for any error committed by judge or jury, and obtain a new trial; for this would be to put the party twice in jeopardy. But after conviction, the accused may, if error has been committed, obtain a new trial; and such new trial is not considered to be a second jeopardizing of the prisoner.

§ 245. 6. No person shall be deprived of life, liberty, or property, without due process of law.

The same provision is contained in the state constitutions. It was borrowed from Magna Charta, and appears in that celebrated instrument in the following form: "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ." No freeman can be taken, or imprisoned, or disseized, or outlawed, or in any other manner injured, nor will we proceed against him, unless by the lawful judgment of his peers, or by the law of the land.

The phrase, "law of the land," as originally used, referred to the trial by wager of battle or by ordeal, as distinguished from trial by one's peers; but it has long been settled in England and America, that under the modern law and institutions, this phrase, and "due process of law," are identical in import. Let us endeavor to obtain a clear idea of their meaning and application.

§ 246. It is plain that any statute which Congress or legislature may see fit to pass, is not, in the sense in which the words are used in the Constitution, "due process of law," or "the law of the land." Otherwise this safeguard of private rights would become a mere empty form. Due process of law implies, primarily and principally, that regular course of judicial proceeding to which our fathers were accustomed at the time the Constitution was framed; and, secondly, and in a subordinate degree, those more summary measures, which are not strictly judicial, but which had long been known in the

English law, and which were in familiar use when the Constitution was adopted. These summary measures generally, though not universally, form a part of that mass of regulations which many juridical writers term Police, and which relate to the preservation of public quiet, good order, health, and the like. The regular judicial proceedings, which thus constitute due process of law, differed in different courts, but they were all well known and acknowledged. They all required a judicial trial to determine the rights of parties, a public charge, an opportunity to answer, and a verdict of jury or decision of judge. It must not be understood that trial by jury is an essential element in due process of law. Courts of equity and admiralty dispensed with this method of determining the facts in litigations; while in common law cases, and in criminal trials, it was in general use.

The summary measures which may form a part of due process of law are those which have been admitted from the very necessities of the case, to protect society by abating nuisances, preserving health, warding off imminent danger, and the like, when the slower and more formal proceedings of the courts would be ineffectual. Such measures of administration have been common in England since the epoch of Magna Charta, and in this country from the colonial times. Still, no statute of Congress or of a state legislature authorizing such summary methods would be in accordance with due process of law, unless these methods were substantially identical with those in existence when the Constitution was framed, and which might, therefore, be considered as within the meaning and intent of the people who adopted the organic law.

§ 247. The cases which have given a definition or illustrations of due process of law are exceedingly numerous; and, as they substantially agree in their conclusions, I shall only refer to a few, in which the judges have expressed themselves with great clearness, precision, and accuracy. Mr. Webster thus defined the phrase: "By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold

his life, liberty, and property, under the protection of general rules which govern society. Every thing which may pass under the form of an enactment is not the law of the land."

Mr. Justice Bronson, certainly one of the ablest jurists that ever sat on the Supreme Bench of New York, thus defined the phrase in *Porter v. Taylor*:<sup>1</sup> "The words 'by the law of the land' do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The meaning of the section seems to be, that no member of the state shall be deprived of his rights and privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. The words, due process of law, cannot mean less than a prosecution or suit according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property."

§ 248. This language must be taken with the important limitation, that the forms and solemnities required must be such as were essentially in existence at the time of forming the Constitution, as a part of the ordinary means of administering justice. Different courts employed different methods of procedure, and were appropriate for the determination of different classes of rights. But the essential elements in all judicial proceedings were the same. The legislature may change the outward form, the mere practice, but cannot alter the substance without interfering with the due process of law.

But the definitions and descriptions quoted would give a one-sided view of the phrase under consideration, unless it be remembered that they refer to one branch only of due process of law,— that which consists in orderly judicial proceedings,— and do not apply to the more summary and quasi-judicial modes which are also supported by the constitutional requirement. The legality of these latter is sustained by the highest authority.

§ 249. The following language was used in *Wynehammer*

<sup>1</sup> 4 Hill's R. 140.

*v. The People*,<sup>1</sup> a case decided with great consideration by the court of last resort in New York: "I doubt whether this clause necessarily imports a jury trial as a part of all due process of law. If it does, then it is difficult to say on what ground equity proceedings, in which trial by jury is quite unusual, and by which men are often deprived of property, can be sustained."

In *Murray's Lessee v. The Hoboken Land Co.*,<sup>2</sup> the Supreme Court of the United States examined this whole subject with great care, and gave an authoritative interpretation to the clause. The case was somewhat peculiar. The controversy related to the title to a certain tract of land. The land had been formerly owned by a person who was a public officer of the United States. In accordance with a general statute of Congress authorizing the proceeding, this land had been seized and sold by a process called a distress warrant, issued by the Secretary of the Treasury against this public officer, on account of an alleged balance due from him to the United States, although this balance had not been ascertained by any trial, nor had the warrant been issued in any judicial investigation. One of the parties to the suit claimed the land by virtue of this sale. The original owner subsequently transferred the land, and the other party succeeded to the rights thus created. The question to be decided was, whether the statute of Congress and the summary proceeding of seizure and sale under it were in accordance with the clause of the Constitution requiring due process of law. After stating that the phrase was equivalent to the other words, "the law of the land," and that its meaning was to be ascertained from the practice of the English legislature and courts subsequent to the time of Magna Charta, and after referring to many statutes of England and of the American states similar to the one under review, Mr. Justice Curtis concludes as follows: "Though due process of law generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled judicial proceedings, yet this is not universally true. There may be, and we have

<sup>1</sup> 3 Kernan's R. 425.

<sup>2</sup> 18 Howard's R. 272.



seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process in its nature final issues against the body, lands, and goods of certain public officers without any such trial." The statute of Congress was held to be valid. This case fully and necessarily sustains the position, that methods which had been known to the English and American law, and were familiar to the people at the time when the Constitution was adopted, although not judicial in their character, do constitute a portion of the due process of law by which a person may be deprived of life, liberty, or property.

§ 250. The limitation under consideration has been applied in numberless instances. Of course it forbids any act of legislature or of executive which takes one person's property and gives it to another; or which would imprison or otherwise punish a person without any of the forms of judicial procedure. The difficulty of its application arises in two classes of cases: (1) in those where a semblance of regular judicial action has been preserved, while its substance has perhaps been abandoned; and (2) in those instances where property is taken or destroyed, or persons restrained in a summary manner, and the contention is whether these acts can be fairly included among those measures of police which have been allowed by the English and American law from time immemorial.

§ 251. 7. Private property shall not be taken for public use without just compensation. A similar provision is found in the state constitutions.

The nation, or the state, may take private property in virtue of two capacities inhering in the body politic, — the right of taxation, and the right of eminent domain. The subject of the taxing power will be considered at large in the succeeding chapter. I will now only remark that it is not at all curtailed or restrained by the clause in the Bill of Rights under examination. In levying all taxes the government is assumed to make compensation to the payer, in the security which is afforded by a well-ordered administration. Every individual is charged with a duty to contribute towards the support of

the government his share of the public expenses, and, as will be shown, the government rests under no restriction as to the amount which it may claim.

§ 252. But the right of eminent domain rests upon different principles. The government, in the exercise of this attribute, takes, not the proportionate share which every individual is bound to contribute, but something over and above his share, and is therefore bound to return to him not only the general compensation which it gives to all persons who pay taxes, but particular compensation for the property seized. These principles are very clearly stated and illustrated by Mr. Justice Ruggles in the case of *Griffin v. The Mayor of Brooklyn*,<sup>1</sup> in which case it was held that local assessments made upon property-holders by the municipal authorities of cities and villages to defray the expenses of opening and improving streets, are not made by virtue of an exercise of the right of eminent domain, but by virtue of the taxing power, and are not, therefore, in derogation of the clause which forbids the taking of private property for public use without just compensation.

§ 253. The power to take private property for public use is often, and indeed quite generally, delegated to corporations which form no part of the government, but which are constituted for the purpose of constructing some works of public utility, as canals, railways, turnpikes, bridges, and the like. It may seem somewhat startling that private persons, associated only for private ends, for their own private gains, should be permitted to wield a power which by its very nature belongs to the government, simply because the works which they construct may incidentally be a benefit to the community at large. The rule permitting such a transfer of functions from the state or nation to private individuals was not adopted without a struggle; but it is now too well settled to admit of any question, although the power is plainly liable to abuse.

§ 254. It may be asked whether the United States may not, in any conceivable case, take the private property of its citizens without making compensation. May not military

<sup>1</sup> 4 Comstock's R. 419.

officers in command of troops engaged in actual hostilities, seize the lands and effects of citizens when impelled by a military necessity? It must be remarked, that whatever the officers, either civil or military, of the United States may do, whether in obedience to a statute of Congress, order of judge, or command of President, the United States is not *legally* liable to the injured party. He cannot enforce his claim by a suit against the government; the nation as a supreme political society cannot be prosecuted. If the act was unlawful, the officer or agent doing it makes himself personally responsible as a trespasser; the direction of his superior, or even the void statute of the legislature is no protection or justification. If he be not thus personally responsible, it follows as a necessary consequence that the act was lawful. The United States may be *morally* bound to make compensation, but this duty is one of imperfect obligation; the claimant can only appeal to the discretion of Congress, not to the compulsory power of the courts. The test of the legal, constitutional authority of the government is, therefore, the personal responsibility or non-responsibility of its officers and agents. These remarks are necessary to explain the language of Mr. C. J. Taney, which is now to be quoted.

§ 255. The Supreme Court of the United States had occasion to examine the power of the government to seize the private property of a citizen without making compensation, in the case of *Mitchell v. Harmony*,<sup>1</sup> growing out of events in the Mexican War. Mitchell, a military commander, had seized property of Harmony, an American citizen, claiming the right to do so under a military necessity. Being sued for the value of such property, the question of fact presented for decision was, whether the necessity actually existed. The court were of opinion that it did not, and held the officer responsible. But in rendering his judgment, Mr. C. J. Taney laid down the following most important doctrines: — “There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and also

<sup>1</sup> 13 Howard's R. 115.

where a military officer charged with a particular duty may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner, but the officer is not a trespasser." I pause in the citation to remark that this duty is only moral and not legal. Were it legal, it could only be so because the act was done without authority, in which case the officer would be a trespasser. The judge proceeds: "But we are clearly of the opinion that in all these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend upon its own circumstances. It is the emergency which gives the right; and the emergency must be shown to exist before the taking can be justified. In deciding upon this necessity, however, the state of the facts as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others, as well as his own observation. And if, with such information as he has a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser."

§ 256. These rules must be applicable to many cases arising in an internal war, whether of invasion or rebellion. To inquire how far they are applicable would lead me into a discussion too extended for my present purpose. It is plain that military commanders may seize and occupy lands of private citizens when needed for encampments, battles, temporary fortifications; and the houses of private citizens when needed for quarters, and hospitals; and timber, growing and cut, when needed for fuel or works of defence; and provisions when needed for subsistence; and cattle or horses when needed for transportation. When the necessity actually exists, and the

commander acts upon it, he is not personally responsible ; and the only duty which rests upon the government is the universal moral duty to do right and justice under all circumstances, a duty which in this case can only be voluntarily performed by Congress, and not enforced by the courts. The Congress, if it deems best, may specially provide for each claimant, or it may pass general statutes under which all demands may be examined and settled ; it cannot be compelled to do either.

§ 257. The restrictive clauses of the Constitution, which have thus been passed under a rapid review, were intended to oppose an effectual barrier against any encroachments by the government upon the private rights of the citizen. Even the administration of justice in the ordinary procedure of the courts is made to lean strongly in favor of the accused. It has been thought better that the state should be unable to punish crimes in certain instances, than that the rulers should have the power through a perversion of judicial proceedings, to oppress and wrong the people. While we retain our love of civil liberty, while the blood of our Saxon ancestors yet runs in our veins, these safeguards will not be relaxed. They were wrested from the Crown by the people of England through generations of conflict. We inherited the benefits which our fathers had obtained ; we shall not readily suffer them to be taken from us.

§ 258. But here a most important question presents itself. Do these restrictions apply with equal force, and under all circumstances, while the nation is operating by its military, rather than by its civil arm ? Does a condition of internal war, and do the exigencies of military movements, ever discharge the government from the restraining effect of this Bill of Rights ? Must arrests of citizens not in the military service be made in all instances upon special warrants ? charges in all instances be preferred by grand juries ? trials had in all instances by petit juries ? Must due process of law be observed under all circumstances ? These are questions which, as all know, have attracted much attention during the past six years. I do not purpose to consider them here, and shall postpone any examination of the subject until those chapters are reached

which treat of the war powers of the government. It is sufficient now to refer to the late case of *Ex parte Milligan*,<sup>1</sup> in which the Supreme Court of the United States expressed an opinion that partially covers these questions.

## SECTION II.

## IMPLIED LIMITATIONS.

§ 259. I come now to consider the second class of limitations upon the government, namely, those which are implied from the general nature of the government itself, and the design of the instrument by which it was created.

It is conceded by all that the government of the United States is one of limited powers; limited by the very nature and essence of its construction. It can wield only such attributes as are conferred upon it by the Constitution. Now the grants contained in the organic law are all expressed in the most general language; they do not descend to details; they do not assume to point out the means and methods by which the various powers are to be made operative. To illustrate: Congress is authorized "to regulate commerce with foreign nations." Nothing is said as to the meaning of the words "regulate" and "commerce," or as to the extent to which the regulation may be carried. All this is left to construction, and, as we have seen, it must be a judicial construction which is to settle the import of this and all other grants of power.

§ 260. Two schools of interpretation have existed among the statesmen and politicians of the country. The one has taught that a strict and close construction is to be placed upon all the grants of power contained in the organic law, so as to limit the government to those acts and means which are absolutely necessary to give force and operation to the grant. The other has maintained that the instrument is to be construed liberally, so as to enable the government to adopt any means which would fairly and reasonably conduce to make the grant of power operative; and that among such means the government

<sup>1</sup> 4 Wallace's R. 2.

has an unrestricted choice, which cannot be limited by the judiciary. Those who have thus read the Constitution, assert that the powers of the government are full, complete, and absolute within the range of the subjects committed to its care; that it may adopt whatever means it prefers which may tend to give effect to the general provisions of the fundamental law; that among such means the selection is entirely a matter of policy and expediency, and not of constitutional power. No other question has been so vigorously debated, so fiercely contested as this. It has been at the bottom of most of the differences which have separated political parties from the adoption of the Constitution unto the present day.

§ 261. Still it cannot be denied that the practice of the government has been in accordance with the latter more liberal theory of construction. The Supreme Court of the United States has uniformly affirmed this view with the greatest emphasis, and applied it to cases of the highest importance. The tribunals of most of the states have followed the lead of the national judiciary, although some of them have adopted the opposing theory, and enforced it with great earnestness. The history of their legislation, and the character of their legislative acts, show beyond a cavil or doubt that the same method of interpretation has guided Congress in the discharge of their duties.

§ 262. A brief reference to a few examples of legislation will serve to illustrate and confirm the latter statement. The Constitution gives to the government the power to regulate commerce. A strict construction would restrain this function to the passage of such statutes as were absolutely necessary to the regulation; such as those relating to the registry and enrolment of vessels, the mutual rights and duties of owners, masters, and seamen, the government of ports and harbors, and the like. Yet, under this grant Congress has assumed to enact laws for the improvement of harbors, the construction of piers, the erection of an astronomical observatory, the conduct of a coast survey. It has invaded the common law by limiting the liability of carriers on the ocean and the great lakes; it has sent out expeditions to observe an eclipse, and to

explore the topography of the Dead Sea. All of these acts are, indeed, means which plainly tend to the regulation of commerce; none of them are indispensable to it. Yet, I think it is not assuming too much to assert that the nation has settled down to the opinion that these and similar measures are proper and lawful.

Again; Congress is authorized to lay taxes, duties, imposts, and excises. The partisans of a strict construction have urged that the levying of duties must be confined to so much as may be necessary for a tax. But during a large portion of our history a tariff has been in operation, which was designed, and did operate to protect certain home interests. A protective tariff is certainly not indispensable to the execution of the power to lay taxes; but it is as certainly one of the methods of exercising that power.

Again; Congress is authorized to borrow money on the credit of the United States. No power is given in terms to create a corporation. Yet, for a great part of the time since the Constitution was adopted, an United States bank has been in existence, created by Congress; and within the past few years a system of national banks has taken the place of the state institutions. Under the same grant of power, the Congress has authorized the issue of paper currency by the Secretary of the Treasury, and has declared such notes to be legal tender in the payment of debts public and private.

Numberless other instances might be cited, but these will suffice to substantiate the statement that the actual legislation of the United States has been conducted upon the principle of giving a free and liberal construction to the various clauses of the Constitution which contain grants of power. This uniform practice, commenced at the very origin of the government, and continued to the present day, is evidence of the most cogent character that the system of interpretation upon which it has been based, is correct.

§ 263. When we turn to the authoritative utterances of the Supreme Court of the United States, we shall find that high tribunal from the very outset adopting the same view of the organic law, and steadily adhering thereto until their very



latest decisions. I cannot refer to all the cases in which this principle has been either explicitly announced and acted on, or implicitly involved. Such a multiplication of authorities would be unnecessary. But my exposition of the subject would be very incomplete did I not quote some of the language which has been employed by that court in leading cases where the question has been brought before it for careful consideration and settlement.

X § 264. In the early case of *Fisher v. Blight*,<sup>1</sup> Mr. C. J. Marshall said: "It would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution." The rule was applied to a statute of Congress giving the United States a priority over other creditors in collecting its demand from the estate of an insolvent debtor.

§ 265. In *Martin v. Hunter's Lessee*,<sup>2</sup> the Supreme Court used the following language: "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. Hence its powers are expressed in general terms, leaving to the legislature from time

<sup>1</sup> 2 Cranch's R. 396.

<sup>2</sup> 1 Wheaton's R. 304, 326.

to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."

§ 266. In *McCulloch v. The State of Maryland*,<sup>1</sup> the subject was presented to the Supreme Court in the most formal manner. The question at issue was the validity of a statute creating the United States Bank. Certainly, no direct power is given to establish such an institution; nor was it indispensable to the execution of the power to borrow money, to collect taxes, or to pay debts. Either and all of these acts may well be performed without a bank. The constitutionality of the measure was rested entirely on the ground that such an institution was a legitimate means of carrying out the general powers, and that the degree of its necessity was a question of legislative discretion and not of judicial cognizance. The counsel engaged in the argument were among the very ablest in the nation, including Webster, Pinckney, and Wirt. The opinion of the court was given by C. J. Marshall, and is a masterpiece of judicial reasoning and eloquence. After a long and exhaustive discussion on the nature of the government, and the rules by which the Constitution is to be interpreted, in the course of which he observed, "if any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action," he concludes his argument with the following language: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

<sup>1</sup> 4 Wheaton's R. 316.

§ 267. In the great case of *Gibbons v. Ogden*,<sup>1</sup> the same court, by the mouth of the Chief Justice, reasserted the same theory, and applied it to the grant of power to regulate commerce. The judgment contains the following language : “ This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized to make all laws which shall be necessary and proper for the purpose. But this limitation in the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do the gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the terms, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument — for that narrow construction which would cripple the government, and render it unequal for the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent — then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.”

§ 268. Nor must it be supposed that these liberal and high national views which prevailed in the Supreme Court during the presidency of C. J. Marshall, have been abandoned, or in

<sup>1</sup> 9 Wheaton's R. 1.

the least degree modified, in later times when the court has been composed of other judges under the leadership of C. J. Taney. The same principles have been constantly maintained, and the same doctrines asserted and enforced. Thus in *The State of Pennsylvania v. The Bridge Company*,<sup>1</sup> it was decided that the power to regulate commerce confers upon Congress the right to pass a statute declaring that a bridge over the Ohio River should remain, although the court had before ordered it to be removed as a nuisance. In *Ablemann v. Booth*,<sup>2</sup> C. J. Taney expressed himself in the following pointed manner. "The powers of the general government and of the states, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres; and the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye." One of the latest decisions of the court during the life of C. J. Taney, was that of *The Bank of Commerce v. New York City*,<sup>3</sup> which held that the power to borrow money conferred on Congress the right, as one of the means for making this power effective, to exempt the United States securities from state taxation; and a series of subsequent cases has reaffirmed the doctrine.<sup>4</sup> Numerous judgments of the state courts might be quoted to the same effect, but it is sufficient to refer the student to *The Metropolitan Bank v. Van Dyck*,<sup>5</sup> in which the Court of Appeals of New York examined the whole subject in a very exhaustive manner, and applied it to the Legal Tender Act of Congress.

§ 269. The following principles have thus been settled by the concurring action of the national legislature and judiciary.

The government is one of enumerated, limited powers, and

<sup>1</sup> 18 Howard's R. 421.

<sup>2</sup> 21 Howard's R. 506, 516.

<sup>3</sup> 2 Black's R. 620.

<sup>4</sup> *The Bank Tax Cases*, 2 Wallace's R. 200; *Van Allen v. The Assessors*, 3 Wallace's R. 573; *People v. Commissioners*, 4 Wallace's R. 244.

<sup>5</sup> 13 Smith's (27 N. Y.) R. 400.

nothing is within its jurisdiction that is not contained in the constitutional grants either expressly or by reasonable implication. When any act is attempted by the government, authority for that act must be found within the provisions of the organic law.

But within the scope of functions assigned to it, over the subjects committed to its care, the powers of the general government are complete, supreme, absolute ; as to these subjects of legislation, Congress is as omnipotent as the British Parliament.

In respect to particular governmental measures, the Constitution does not descend to any minuteness of detail in the recital of the various functions which it confers ; it deals only in generals. Daniel Webster, with a power of insight and expression which condensed a volume of discussion into a single sentence, remarked that "our Constitution is one of enumeration, and not of description." It contains, in fact, a list of the grand subjects and purposes which must be the final objects of all legislation ; but it does not attempt to define all the means and methods by which those objects may be attained. Congress has an unlimited choice among all the means and methods which tend to accomplish any end enumerated in the general grants of the Constitution. If the particular measure which the legislature has enacted, has a tendency to bring about the end, it is lawful, is within the scope of congressional action, and the courts cannot interpose and defeat this measure, although the judges may be of opinion that the means was not the best. In this manner the United States government, while pursuing the legitimate objects for which it was organized, may interfere with many subjects which are committed to the several states and which ordinarily fall under their exclusive jurisdiction.

Finally, the means and methods, the particular measures of legislation, which are adopted, must have some relation to an end included in the general grants of the Constitution ; if there be absolutely no such relation. Congress has erred, not on a mere question of policy, but in an exercise of power ; their work is unwarranted by the fundamental law, and is a nullity.

## CHAPTER IV.

### THE LEGISLATIVE POWERS OF THE UNITED STATES GOVERNMENT.

§ 270. I AM now to discuss the powers which the people of the United States have conferred upon their Congress. These powers are all legislative in their character. In considering them, and in ascertaining their extent, or, in other words, in determining what statutes Congress may lawfully pass, we must constantly bear in mind the important principle which was stated and illustrated in Section II. of the last chapter, — a principle to be freely applied in every case of doubt and difficulty. In connection with this subject it will be natural and proper to speak of those legislative functions and attributes which have been conferred upon, or withheld from, the several states.

The first power which we meet and are to consider is that of taxation.

#### SECTION I.

##### THE POWER OF TAXING.

§ 271. I will collect all the clauses of the Constitution which have reference to the general subject of taxation.

Art. I. Sec. VIII. contains an enumeration of legislative powers, of which the first is as follows: "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Art. I. Sec. II. § 3, provides that "Direct taxes shall be apportioned among the several states which may be

included within this Union, according to their respective numbers." Sec. IX. § 4, declares that "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;" and § 5, that "No tax or duty shall be laid on articles exported from any state;" and § 6, that "No preference shall be given by any regulation of revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to pay duties in another." Sec. X. § 2, provides that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and § 3, that "No state shall, without the consent of Congress, lay any duty of tonnage."

§ 272. In examining this language, we may consider, first, What powers of taxation are held by Congress; and, secondly, What powers are held by the several states.

The first of these questions may be subdivided, so that we may separately examine (1) the purposes for which taxes may be laid and collected; (2) the kinds of taxes; (3) the means and methods of enforcing the power, and (4) its extent. This last subdivision will lead us to the final inquiry, how far the corresponding function of the states is limited.

### First. *What Powers of Taxation are held by Congress.*

#### I. *The Purposes for which Taxes may be Laid and Collected.*

§ 273. Congress has power "to lay and collect taxes, etc., to pay the debts and provide for the common defence and general welfare of the United States." Do these two clauses contain two separate and distinct powers, or is the latter a limitation upon the other? In other words, does the Constitution, by this language, confer upon the legislature a general faculty of taxation, and also another general capacity to pay public debts and provide for the common defence and general welfare; or does it confer a limited power of taxation, by restricting the purposes for which taxes may be laid, and con-

fining them to the payment of debts and provision for the common defence and general welfare? The latter construction is the one which has been almost universally adopted, although the language, taken apart from the context, is susceptible of the other. There are two grounds for preferring the interpretation which has been generally received. Both these clauses are found in a subsection which relates to taxation; and it would be doing violence to the context to wrest one of these from its natural connection and make it refer to a subject entirely different. But again: if the construction should be adopted which regards the second clause as an independent grant of power, it would, in effect, be making our general government unlimited. Providing for the common defence and general welfare includes every thing which any government could possibly do; and a grant of power in these broad terms would be the same as making Congress omnipotent, equal in the extent of its functions to the British Parliament.

§ 274. The subsection should, therefore, be understood as though it read, taxes may be laid and collected *in order to* pay debts and provide for the common defence and general welfare. Thus the Congress does not possess an absolutely unlimited power of taxation. It can only resort to this high attribute for one or more of three purposes, payment of debts, the common defence, the general welfare. The defence must be common, and the welfare general. But, after all, this leaves a sufficiently wide field for the legislative operations. Money may be raised to pay any debts however contracted, whether now existing or to become due at a future time. Common defence and general welfare are terms of the broadest generality; and within them can be easily included all the objects for which governments may legitimately provide.

§ 275. What measures, what expenditures will promote the common defence or the general welfare, Congress can alone decide, and its decision is final. It is certainly not necessary that any particular expenditure should be spread over the whole country, to bring it within the meaning of a defence which shall be common, or a welfare which shall be general. All the disbursements of the government must be met by



revenue of some kind, and must finally be paid by some species of taxation, except that small portion which may be provided for by the sale of public property. Congress expends vast sums of money in the erection and adornment of a capitol, in furnishing a library, in the purchase of pictures, statues, and busts, in endowing a scientific institution ; but it is not claimed that these disbursements are not made for the general welfare. A fort in New York is for the common, not local, defence. In short, the legislature is not trammelled by these provisions ; it has ample scope and verge in which to indulge its proclivities to raise and expend money.

## II. *The various Kinds of Taxes.*

§ 276. Congress may lay and collect "taxes, duties, imposts, and excises." Another clause speaks of capitation and other direct taxes. Let us inquire into the meaning of these various terms. The word "taxes" is generic, and includes all species ; the words "duties," "imposts," "excises," "capitation," "direct" and "indirect" taxes, are specific, instances and examples of the genus tax. It is plain that if the Constitution had said Congress may lay and collect taxes, and there had stopped, it would have conferred all the power which is now granted. The specifications were only added for greater caution. "Duties" and "imposts," as commonly used, are synonymous, although "imposts" is etymologically a word of broader meaning. They are especially applied to those sums of money demanded by the government for the privilege of importing or exporting merchandise ; although "duties" also describes fixed sums paid on ships and other instruments of commerce, as tonnage duties and the like. "Excises" is a word of wide significance, and includes almost all forms of tax which are not direct, and which are not strictly "duties." The various payments required by the existing internal revenue laws are examples of excises. Payments of a percentage upon incomes, upon sales, upon the circulation of banks, upon the value of manufactured articles, upon the products of the soil ; license fees for carrying on different

branches of trade and business; stamps upon written instruments, judicial proceedings, articles of manufacture, are all excises.

Capitation or poll taxes are fixed sums of money paid by or for each person without reference to his property or business.

§ 277. All taxes are separated into two classes, — the direct and the indirect. Direct taxes include those assessed upon land, and those which pass under the denomination of capitation or poll, and probably include no others. Indirect taxes would then embrace all the remaining species, and would be co-extensive with duties, imposts, and excises. I say this division is probably correct, for the question has never yet been authoritatively decided by the Supreme Court of the United States; although in an early case, which will be referred to in the following subdivision, the judges expressed a very decided opinion that no other taxes were “direct,” within the meaning of the Constitution, but such as were laid upon lands, and such as were strictly capitation.

### III. *The Means and Methods of enforcing the Taxing Power.*

§ 278. The Constitution provides that no capitation or other direct tax shall be laid unless in proportion to the census; that direct taxes shall be apportioned among the several states according to their population; that duties, imposts, and excises shall be uniform throughout the United States; and, in immediate connection with the last provision, that no discrimination shall be made in regulations of the revenue in favor of any state. Finally, Congress is forbidden to lay duties on articles exported from any state. What is the meaning of these provisions? Two principles apply to the entire subject of taxation: Apportionment of direct, and uniformity of indirect, taxes. Direct taxes are to be laid and collected in one manner; all others in a different mode.

§ 279. Direct taxes must all be apportioned among the several states according to their population. Thus, if Congress proposes to levy a direct tax, it must first fix the whole amount of money to be raised in this manner; and this amount it must

divide among all the states in sums proportioned to the number of inhabitants in each. That is to say, the same process must be gone through with which is adopted in ascertaining the number of representatives to which each state is entitled. It is evident, therefore, that the raising of direct taxes involves a large amount of labor, calculation, and adjustment. But the Constitution is peremptory, and a statute purporting to lay and collect a tax of this kind in any other manner, would be a mere nullity.

§ 280. Imposts, duties, and excises, whether laid upon imported goods, upon the instruments of foreign commerce, or upon internal articles, productions, and labor, are only required to be uniform throughout the United States; that is, the rate fixed for any article or subject must be the same in all parts of the country. It is not necessary that all articles should be subjected to the burden, or that all upon which a tax is laid should bear the same rate. But when a rate has been determined for any one subject, that must be retained for the same species in all the states. Neither is it necessary to ascertain at the outset the total amount to be raised, or to divide it among the states. In laying and collecting indirect taxes, the government touches the individual apart from any of his relations to the state of which he is an inhabitant. It requires no argument to show that this description of tax is by far the most convenient, the easiest to lay and collect; and for this reason it has been resorted to at all times by the general government.

§ 281. It becomes necessary, therefore, to inquire a little more particularly, what are direct, and what indirect, taxes? Few cases on the general question of taxation have arisen and been decided by the Supreme Court, for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal revenue acts now in operation are indirect.

This subject came before the Supreme Court of the United States in a very early case, *Hylton v. The United States*.<sup>1</sup>

<sup>1</sup> 3 Dallas' R. 171.

In the year 1794 Congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct, and should have been apportioned among the states. The court decided that this tax was not direct, and the reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal revenue laws.

§ 282. While thus determining that imposts of this nature are not direct, the court was not called upon to decide authoritatively as to the character of all direct taxes; but the several judges, in delivering their opinions, could not avoid discussing the general question. Mr. Justice Chase said: "I am inclined to think that the direct taxes contemplated by the Constitution were only two, namely, a capitation, or poll, tax, simply, without regard to property, profession, or other circumstance, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term direct tax." Mr. Justice Patterson said: "It is not necessary to determine whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land in its original and crude state, ought to be considered as a part of the land itself. When the produce is converted into a manufacture, it assumes a new shape. Whether direct taxes, in the sense of the Constitution, comprehend any other than a capitation tax, and a tax upon land, is a questionable point. I never entertained a doubt that the principal — I will not say the only — objects which the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land." Mr. Justice Iredell said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably connected with the soil, — something capable of apportionment under all circumstances. A land and a poll tax may be considered of this description."<sup>1</sup>

<sup>1</sup> Mr. George T. Curtis, in an article contributed to *Harper's Monthly Magazine* for August, 1866, criticizes the language of the judges in this case. I cannot, however, adopt his speculations; they are opposed to the uniform practice of the government, as well as to judicial dicta.

§ 283. The clause which declares that "no tax or duty shall be laid on articles exported from any state," has always been considered as expressly prohibiting all duties and imposts on exports as such. Still, in order to fall within this restriction, the tax must be laid upon the article as a condition of its being exported, while it is, so to speak, in the act of transit out of the country. An export duty must be the counterpart of an import duty. It cannot for a moment be admitted that an impost upon internal articles of growth and manufacture, while they are internal, is forbidden, even though the principal, nay, even sole, use to which these articles are put in the trade of the country is to export them. Were such a position to be assumed, the power of the government to raise a revenue would be materially curtailed; the necessary result would be that the fact of subsequent exportation would be the test of the prior liability to be taxed, — an absurdity too great to have been contemplated by the framers of the Constitution. But the language of that instrument does not admit of such a construction. It is not said that no tax shall be laid upon articles which may possibly, or probably, or even certainly, be exported from a state, but upon "articles exported" from any state.

§ 284. The power to lay and collect taxes includes the power to adopt all measures which may tend to carry out the object of the general provision. Thus, the collection of duties on imports requires the appointment of the retinue of officers necessary for the purpose, and the establishment of all the means and checks requisite to secure and guard the public funds. The same is true of the internal revenue law: The laying and collection of excises includes all measures conducive to the effective working of the system: measures of discovery, penalties for frauds, punishments for criminal acts. The imposition of stamps requires that all instruments on which the stamp is made necessary, should be declared void if the parties interested have neglected to obey the law. To sum up: the general grant of power to lay and collect taxes involves the particular power to appoint large numbers of officers, to provide for their compensation, and to make rules for their guid-

ance ; the power to forfeit vessels, cargoes, and other property of persons who violate the laws ; the power to punish by fines and imprisonment ; the power to investigate the private circumstances of citizens ; the power to interfere with private contracts between individuals, and to declare them void in case of failure to comply with the statute ; and perhaps the power to interfere in like manner with judicial proceedings in the state courts.

#### IV. *The Extent of the Taxing Power.*

§ 285. The attribute of laying and collecting taxes belongs to the government from the very necessities of the case. To carry on the public affairs, to provide for the common defence, and to promote the general welfare, demand a revenue commensurate with the exigencies of the nation. This revenue must finally be supplied by some species of taxation. A resort to loans is always intended as temporary, for debts thus contracted must some time be paid off. The government, therefore, must be able to call upon the property of individuals, and there can be no limit to the extent of that call, within the legitimate purposes for which a revenue may be raised. In regard to the extent of the power to tax, C. J. Marshall said in *Providence Bank v. Billings* :<sup>1</sup> "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as a part of itself, and need not be reserved where property of any description, or the right to use it in any measure, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature." The same eminent judge remarked in *McCulloch v. The State of Maryland* :<sup>2</sup> "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately

<sup>1</sup> 4 Peters' R. 514, 561, 563.

<sup>2</sup> 4 Wheaton's R. 316, 428.

exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people, therefore, give to their government a right of taxing themselves and their property ; and, as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

§ 286. These views have never been questioned ; all accede to their correctness. Whenever, then, the United States may lawfully call for any revenue at all, there is no limit to the amount they may demand and collect. When they may tax at all, they may lay heavy or light burdens according to their own discretion. Judges and courts cannot interfere and control this discretion by deciding that any particular imposition is too much and shall not be collected. The amount of a tax is not a question of power, but of policy ; not of constitutional law, but of political economy. If the people are weighed down by greater loads than they are willing to bear, they have the sure and speedy remedy in their own hands. The biennial election of Representatives in Congress gives frequent opportunity to change these public servants by removing those who voted for the tax, and filling their places with others who will repeal or modify the obnoxious law. Such an expression of public opinion would inevitably produce its effect upon the legislature. The people have constituted themselves the sole judges of this matter ; they have not parted with any portion of this attribute to the courts, national or state.

§ 287. When Congress sees fit to lay and collect duties upon imported goods, they may demand any amount which is deemed proper in their own discretion. The only limit upon their power is that they must fix the same rate for the same article in all parts of the country. Uniformity is the constitutional rule.

When Congress sees fit to lay and collect a tax on land, they may demand any percentage of the land's worth; subject only to the restriction that the whole amount thus to be raised must be apportioned among the several states according to their respective populations.

When Congress resorts to the system of excises, they may demand any percentage of incomes, any sums as license fees for carrying on particular businesses, any portion of the amounts paid upon sales, any value of stamps upon written instruments or articles of merchandise. The only limitation is, that the rule of uniformity must prevail throughout the United States. This rule does not require that all trades, businesses, merchandise, written instruments, and the like, shall be taxed alike, or even taxed at all. It means that when an impost is placed upon one article, the same burden shall be borne by that subject in all parts of the country. Congress may discriminate between articles in all the several species of indirect taxes; the discrimination may be unfair and impolitic, but it is not illegal.

§ 288. There can be no question of the correctness of these general propositions; they are universally admitted. But there has lately arisen a question growing out of our new scheme of revenue legislation, which should be briefly discussed. Congress has provided in the internal revenue laws now in operation, that stamps of various denominations shall be fixed to certain private written instruments; and as a penalty for a violation of the statute, has declared that instruments which are without the requisite stamp, shall be void. There is no doubt as to the power of the national legislature to pass such a law. Stamp duties are, and long have been, a familiar species of excises; and the power to lay and collect such taxes implies the power to enforce obedience by imposing any penalty or punishment that may be thought necessary. A law without a sanction would be no law. There has been, therefore, a general acquiescence in the legality of these provisions.

§ 289. But in the same law the Congress provided that stamps of a certain denomination should be affixed to divers papers used in judicial proceedings; and as a penalty for a



disregard of the requirement, declared that the papers lacking the appropriate stamp, could not be used in the suit, or in the course of the proceeding. This law was made applicable to controversies and other matters in state courts.<sup>1</sup> The public, the bar, and the judiciary, generally acquiesced in the lawfulness of this species of taxation. A few state courts, however, have denied its legality, and pronounced it unconstitutional. The Supreme Court of Indiana, in the case of *Warren v. Paul*,<sup>2</sup> led the way in this opposition to the Congressional legislation, and the judges of other states have adopted its conclusions. These courts and judges have rested their objections upon some assumed sacred character of judicial proceedings, which exempts them from taxation. They have quoted certain writers upon political economy who pronounce such a stamp duty to be a tax upon justice. They have affirmed that Congress, by placing an impost on papers used in matters pending before the state tribunals, has interfered with, and endeavored to control, a subject entirely beyond its reach.

↳ § 290. It should be remarked that this is a question which must be decided in an authoritative manner by the Supreme Court of the United States, and until their decision, all reasoning upon the statutory provision must be, to a certain extent, speculative. But I have no doubt as to the legality of this application of stamp duties. The grounds of this opinion are briefly as follows: —

Even granting that such stamps do not fall within the category of ordinary excises, they are unquestionably a species of tax; and the national legislature has full and complete powers conferred upon it in the general provision that it may lay taxes. What kind of taxes is not designated; all kinds are included.

But, in fact, these stamps are excise duties as much as those affixed to notes or deeds. To say of them that they are a tax upon justice, is only to call them hard names. It does not

<sup>1</sup> Although these provisions have been lately repealed, yet, as the subject is one of so great importance, at least as a matter of speculation, the discussion is retained in the text.

<sup>2</sup> 22 Indiana R. 276.

change their character as excises ; it is only a strong expression of opinion that they are impolitic. Mr. John Stuart Mill, when he used this language, was only discussing the kinds of revenue laws which enlightened legislative bodies ought to pass ; not those which they have power to pass. The stamps in question are really taxes upon property.

§ 291. Notes, deeds, and other instruments are the means by which persons acquire and hold a title to property. The papers in judicial proceedings are just as truly the means by which persons acquire, hold, or defend their title to property, or rights which result in property, or in property's worth. No court attempts to enforce a right which does not immediately or mediately result in property. Stamps on papers used in judicial proceedings are, therefore, not taxes upon the administration of justice, but taxes upon property or property rights. A note or check is given. This writing is only valuable as it shall result in a certain sum of money or money's worth. The law assumes this value and demands a tax thereon corresponding in amount. A person brings a suit to recover a debt, or damages for a wrong, or some specific land or chattel, or to acquire or protect some right having an intrinsic money value. The process he issues is one means by which he may attain the object of his contention ; it has value only so far as it shall result in obtaining that object. The law assumes this value, and demands a certain sum for the privilege of issuing the process. This is certainly a tax on property, and not upon that series of acts which we call the administration of justice. And if Congress may lay the tax at all, there is no dispute but that they may enforce its payment by declaring the proceeding void in which the requisite stamp is wanting.

§ 292. It has also been urged that if Congress may thus impose a tax in connection with the judicial proceedings, they might also in connection with the legislative proceedings of a state, and might declare void a state constitution or statute, when the paper upon which it was engrossed was not authenticated by a stamp. There is really no analogy between these cases. Congress does not impose taxes upon the acts, as such, of public functionaries, whether they are legislators, judges, or

administrative officers. With the single exception of capitation taxes, all imposts are laid upon the private property of citizens. Judicial proceedings are not taxed because they are judicial proceedings, but because they are the direct means of obtaining property or rights which have a value as property. Statutes and constitutions are not the representatives of property. Existing as laws, they are only rules of conduct, and have no taxable quality.

§ 293. The objection, that Congress, by imposing stamp duties upon papers used in the judicial proceedings of state courts, is thereby interfering with matters over which it has no control, if well founded, would strike at the very foundation of the whole system of excises. It is true that the Constitution does nowhere give Congress the right to interfere directly with state courts or laws, so as to control their action. Neither does it confer the power to interfere directly with the trades, professions, property, transfers, sales, and other contracts of private individuals. All these subjects are among the matters confided to the states. But as these matters all stand upon the same foundation, the unlimited power to tax gives a right to interfere with, and control them all indirectly, so far as may be necessary to make the tax effective, and to raise the desired amount of revenue. There is, in truth, no legal objection to the taxing of judicial papers, which does not apply with equal cogency to the imposition of stamp duties upon private agreements.

§ 294. Since the power to tax is unlimited where Congress has the right to invoke it at all; or, in other words, since the legislature may demand and receive any amount of revenue, when the purposes are such that revenue can be appropriated for them at all, it is an interesting question, for what purposes may money be appropriated; and this is the same as asking for what purposes may money be raised. Growing out of this general inquiry, many controversies have arisen which have divided political parties, and which have been maintained both upon the policy of particular measures, and upon the constitutional power of Congress to pass them. I shall simply state a few of these questions without examining them. They partake so

much of a mere political character, that their place of discussion is rather the legislature, or the popular assembly, than the college class-room, the law school, or the court. Under the general grant of power to lay and collect duties and imposts, may Congress lawfully pass a protective tariff? Under the general provision that taxes may be laid to provide for the common defence and promote the general welfare, may Congress raise moneys to carry out schemes of local internal improvement, repair harbors, build piers, dredge out rivers, construct roads and the like?

§ 295. The dispute upon these questions has been long and violent. It has been urged on the one side that a protective tariff is not a measure for the general welfare, but for the aid of particular classes; that schemes of local improvement do not benefit the whole nation, but only special portions. On the other hand these propositions are denied, and it is claimed that the fostering of one department of industry promotes the welfare of all; that the improvement of New York harbor, for example, produces a beneficial effect throughout the entire Union. It is plain, therefore, that the controversy reduces itself finally to a question of policy, and not of power. If these systems of legislation, which directly and immediately assist a part, do really and substantially aid the whole, the power evidently exists; and whether or not they do in fact promote the general welfare is purely a question of political economy, upon which statesmen have differed, and doubtless will continue to differ.

I may remark, however, that so far as a course of legislative action can settle any thing, the power of Congress to pass such measures may be considered as established.

## Second. *What Powers of Taxation are held by the Several States.*

§ 296. We are now brought to the consideration of a subject which is as important as it is interesting, and which has repeatedly come before the Supreme Court of the United States for decision. What are the relations of the nation and

the several states, in the exercise of the taxing power by each? Is either subject to the other, and if so to how great an extent? It is evident that the Constitution expressly places some limits upon the capacity of the states to tax. They may not lay duties on imports and exports, except such as shall be absolutely necessary for the execution of their inspection laws, or lay any tonnage duties, without the consent of Congress. In addition to these express, are there any implied restrictions upon the taxing power of the state? The whole subject may, therefore, be separated into two divisions: (1) the implied limitations, and (2) the express limitations.

*I. Implied Limitations upon the Power of the States to Tax.*

§ 297. The United States government, within its sphere of action, is paramount, and the states are subordinate. This proposition is contained in the express language of the Constitution, and has been fully illustrated in Part I. of this work. Because the nation is thus paramount, its taxing power is supreme; it may be applied to all subjects; it may be exerted upon all individuals and upon every species of property; and its demands must first be satisfied before the states can resort to the exercise of their function.

On the other hand, the states, because they are bodies politic, have also the power to tax, which they may exert in all instances, upon all subjects, and in all methods, except so far as they are restrained by the national Constitution. In addition to the express restrictions upon it referred to in § 271, this power of the states is limited by the very nature of the entire political society; by the dual division of governmental attributes; by the supremacy of the nation, and the subordination of the local commonwealths. This implied limitation consists in two separate and distinct features. (1.) The state power to tax must be exercised second to that of the general government; or, in other words, the claims of the nation upon persons and property have priority and must be satisfied even to the exclusion of those of the states. This feature is involved in the very idea of supremacy. (2.) The state power cannot be exerted

upon the property of the general government, or upon means which that government has adopted to carry on its public affairs.

§ 298. These propositions are fully sustained by the following decisions of the Supreme Court. Congress had chartered the Bank of the United States, a branch of which was established in Baltimore. The legislature of Maryland passed an act which had the effect to lay a tax upon this branch. The question as to the validity of this tax was presented in *McCulloch v. The State of Maryland*,<sup>1</sup> and decided in the negative. The state law, as it applied to the bank, was held to be unconstitutional and void. The opinion of the court, given by C. J. Marshall, is so long and elaborate that it cannot be quoted here; but it should be carefully read by all students, professional or general, who desire to understand the nature of our government. It is reported that William Pinckney said of this opinion, that in it he saw a pledge of the immortality of the Union. The argument is, that, as the United States is paramount, all the means which it may lawfully adopt for carrying on public affairs, are supreme, and free from state legislation. As the state could not repeal or alter the charter of the bank, so it could not do any thing which tends to hinder or impair the efficiency of that institution. But the right to tax, implies the right to destroy; for if the state may tax at all, it may tax to such a degree as to prevent the operation of the bank; and any amount of taxation has that tendency.

The same question was afterwards again brought up in *Osborn v. The Bank of the United States*.<sup>2</sup> The State of Ohio had laid a special tax of \$50,000 a year upon a branch of the bank, for the express purpose of destroying it. The case showed the results which might be apprehended from the exercise by the states of a power to tax the means of carrying on the general government. The Supreme Court adhered to their former view.

§ 299. The doctrine was applied under very different circumstances in the case of *Dobbins v. The Commissioners of Erie County*.<sup>3</sup> A captain of a United States Revenue Cut-

<sup>1</sup> 4 Wheaton's R. 316.

<sup>2</sup> 9 Wheaton's R. 738.

<sup>3</sup> 16 Peters' R. 435.

ter had been taxed in Pennsylvania upon his salary as a national officer. The sole question was as to the validity of the state tax; and the court unanimously held that it was void, as being beyond the power of the state to impose. This occurred under the presidency of C. J. Taney; so that the court had plainly not receded from the high position assumed under the leadership of C. J. Marshall. The opinion delivered by Mr. Justice Wayne is so concise and accurate a statement of the rule and its reasons, that I will quote its language: "Taxation is a sacred right essential to the existence of a government, an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it to all persons and property within the jurisdiction of a state. But in our system there are limitations upon that right. There is a concurrent right of legislation in the states and in the United States, except as both are restrained by the Constitution of the United States. Both are restrained by express prohibitions; and the states are restrained by such prohibitions as are implied when the exercise of the right by a state conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a state acts upon the instruments, and emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action." The court applied this principle to the salaries of officers under the general government.

\* § 300. The same construction of the Constitution has also been affirmed in a series of decisions, commencing in the year 1829, and extending to the present time, and applied to the stock and other public securities of the United States. In *Weston v. The City Council of Charleston*,<sup>1</sup> the facts were briefly as follows. The city council of Charleston, by virtue of an act of the South Carolina legislature, laid a tax upon all personal estate, enumerating the different kinds of personal property, and including stocks of the United States in terms. The plaintiff was assessed for certain of these stocks, and com-

<sup>1</sup> 2 Peters' R. 449.

menced proceedings to annul the assessment on the ground that the law, so far as it applied to such securities, was unconstitutional and void. The Supreme Court sustained the plaintiff's contention, and annulled the assessment. The case actually decided that stocks of the United States, owned by private persons or by corporations, cannot be taxed as such by the separate states. The grounds of the judgment were, that the general government possesses the power to borrow money; that this power is supreme and paramount; that the states may not prevent, or do any thing to interfere with, its execution; that taxing the evidences of debt in the hands of owners would tend to have this effect by diminishing their value, and thus making persons less willing to loan money to the government.

301. The question arose again in 1862, under a somewhat different form, and the Supreme Court took a further step in the direction of limiting the taxing powers of the states, in *The Bank of Commerce v. The City of New York*.<sup>1</sup> The statute of New York State provided for taxing banks upon the amount of their capitals. The Bank of Commerce had a capital of several millions of dollars, and the largest proportion thereof was invested in United States securities. The bank claimed that this portion was exempt from state taxation. The assessors, however, fixed the taxable property of the bank at the whole value of the capital stock without regard to the fact of its being chiefly invested in the public debt of the United States, but added that this was not made as an assessment upon the public debt, but upon the bank capital. The Court of Appeals of New York held the assessment valid, distinguishing the case from that of *Weston v. The City Council of Charleston*.<sup>2</sup> The distinction insisted upon was that in the latter case the tax was laid upon United States stock *eo nomine*, while, in the New York case, the public securities were included in the mass of property owned by the corporation, and were taxable with that aggregate.<sup>3</sup> The Supreme Court of the United States repudiated this distinction and reversed

<sup>1</sup> 2 Black's R. 620.

<sup>2</sup> 2 Peters' R. 449.

<sup>3</sup> *The People v. The Commissioners of Taxes*. 9 Smith's R. (23 N. Y.) 192.



the judgment of the Court of Appeals, affirming the following propositions: that stock of the United States is not subject to taxation under state laws; that a state law for that purpose is unconstitutional, whether it imposes a tax on the evidences of public debt by name, or includes them in the aggregate of the tax-payer's property, to be valued like the rest, at its worth; that the portion of the capital of a state bank which it has invested in United States stocks, bonds, and other securities, is not liable to taxation by the state; that the taxing power, so far as it is reserved to the states and used by them within constitutional limits, cannot be controlled or restrained by the national court, the prudence of its exercise not being a judicial question; but a state tax on the loans of the general government, is a restriction upon the constitutional power of the United States to borrow money; and if the states had such a right, being in its nature unlimited, it might be so used as to defeat the national power altogether.

§ 302. Prior to the decision last quoted, the statute of New York had required that the capital stock of banks should be assessed and taxed at its actual value. Shortly after the judgment of the Supreme Court, the legislature of New York changed the language of their statute, and enacted that all "banks shall be liable to taxation *on a valuation* equal to the amount of their stock, and their surplus earnings." Under this latter law, the banks were assessed and taxed upon such a valuation, although their capitals were partially or wholly invested in United States securities. The Court of Appeals in New York again sustained the action of the local assessors; and held that the tax thus laid was not imposed upon the bank capitals, and, as a consequence, was not a tax upon the national securities in which such capitals were invested. Thus a mere act of legislative legerdemain was made sufficient to avoid the effect of far reaching principles established by the national judges; the substitution of an intangible "valuation" instead of the real "capital," was treated as a substantial change. But the Supreme Court of the United States swept away these refinements, and in the Bank Tax Cases,<sup>1</sup> decided the assessment and tax

<sup>1</sup> 2 Wallace's R. 200.

invalid, and reaffirmed the doctrines of *Bank of Commerce v. New York*.<sup>1</sup>

§ 304. In the foregoing cases the banks themselves, which were created by Congress as means and instruments for managing the national finances, or which owned public securities of the United States, were taxed, and the tax was in every instance declared to be improper. Another question now presents itself. Are the shareholders in such banks also exempt from state taxation in respect of the shares which they own? A single principle of law would seem to be an answer to this question. The corporation is entirely distinct from the members who compose it; the property of the corporation is entirely distinct from the property of its stockholders. No member of a corporation, by virtue of his ownership of a number of shares, owns any portion of the lands, moneys, securities, or other property belonging to the institution; he is simply possessed of a right to participate in the profits while the business is carried on, and in the property when the corporation is wound up and dissolved. It would seem, therefore, that taxing a shareholder would, in no sense, be taxing the bank, or the property of the bank. But the question has received a judicial examination and answer. The Act of Congress of 1864, relating to the National Banks, provides in § 41, for taxation by the United States. The same section adds: "Provided that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under state authority." Farther provisions were inserted to prevent the states from discriminating, in the imposition of such taxes, against these national banks. New York proceeded to lay a tax on the shareholders. The case of *The City of Utica v. Churchill*<sup>2</sup> involved the legality of the state law and the proceedings under it. The whole capital stock of the national bank referred to in the case was invested in United States securities. The Court of Appeals of New York affirmed the legality of this tax. The

<sup>1</sup> 2 Black's R. 620.

<sup>2</sup> 6 Tiffany's (33 N. Y.) R. 161.

shareholders thereupon carried the case to the Supreme Court of the United States, wherein it appeared under the name of *Van Allen v. The Assessors*.<sup>1</sup> That court, also, sustained the power of the states to lay a tax on the shareholders. It held that the act of Congress conferred a complete authority to impose the tax, in respect to the full amount of the shares, although the capital stock of the bank might be partially or wholly invested in the bonds and other evidences of the public debt of the United States. The whole reasoning of the court would sustain the exercise of the power by the states, even though the law of Congress had been silent upon the subject. Chief Justice Chase, and Justices Wayne and Swayne dissented, and construed the act of Congress as empowering the states to tax the shareholders in respect only of such part of the bank capital as should not be invested in public securities.

The same question was again presented, with a similar result, to the New York court in *The People v. Commissioners of Taxes*,<sup>2</sup> and their judgment was again affirmed by the Supreme Court of the United States.<sup>3</sup>

§ 305. The conclusions to be drawn from these cases may be summarily stated as follows. States may exert their power of taxation generally upon persons and property within their boundaries; but they cannot thereby interfere with any functions of the nation. They cannot tax national property; or the evidences of the national debt owned by individuals; or banks incorporated by the nation as a part of its general scheme of finance; or salaries of national officers. In a word, all the means which are employed by the nation to carry on its legitimate functions are entirely beyond the reach of the several states.

On the other hand Congress may tax any thing created by the separate states, which is property or a franchise in the hands of individuals; banks and all other corporations; state stocks and other securities in the hands of private owners; the proceedings in state courts. Nothing, certainly, exhibits in a stronger light the inherent distinction between the paramount

<sup>1</sup> 3 Wallace's R. 573.

<sup>2</sup> 8 Tiffany's (35 N. Y.) R. 423.

<sup>3</sup> 4 Wallace's R. 244.

supremacy of the nation and the subordination of the states, than this comparison between their respective powers of taxation.

§ 306. A curious and important question has arisen from the exercise by Congress of its power to tax, which may be referred to in this connection. When the United States has established a system of excise duties, and among other things has required that persons carrying on certain kinds of business shall pay a license fee, and take out a license, can a state interfere with persons who have complied with these requirements, or prevent them from prosecuting the particular business for which they have received a national license? No case has arisen which answers the question thus put; for the internal revenue law specially declares that "no such license shall be construed to authorize" the carrying on a business or trade "within any state or territory in which it is or shall be specially prohibited by the laws thereof, or in violation of the laws of any state or territory." In *McGuire v. The Commonwealth*,<sup>1</sup> the Supreme Court held, under this section of the law of Congress, that a person licensed to sell liquors in Massachusetts, was still controlled by the prohibitory legislation of that state; although a strong attempt was made at the bar to convince the court that these provisions of the revenue law were repugnant to the rest of the act, were unconstitutional and void. The same doctrine has since been reaffirmed.

## II. *Express Limitations upon the Power of the States to Tax.*

§ 307. We are now to examine the effect of those express restrictions upon the taxing power of the states, contained in the Constitution. States may levy and collect no duties upon imports or exports, except such as are absolutely necessary for the execution of their inspection laws, and no tonnage duties. The reason of this limitation is plain. As the United States government was intended to have the control of every thing pertaining to commerce, any interference by the states with this subject, any attempt on their part to impose duties on

<sup>1</sup> 3 Wallace's R. 387.

articles imported or exported, would produce all the disorder which the Constitution was framed to obviate.

Many cases have arisen in which a construction has been given to state statutes that seemed to trench upon these provisions of the organic law. The questions which have been discussed are, (1) whether these statutes did in effect lay duties on imports or exports, so as to bring them within the general restriction; and (2) whether they were measures absolutely necessary to carry into execution the local inspection laws, and therefore within the exception. As the limitation under consideration applies exclusively to a particular class of taxes, the whole subject is intimately connected with the regulation of commerce.

§ 308. What classes of legislation are embraced under the denomination of inspection laws? Strictly speaking, inspection laws provide for a service to be performed on land, upon articles within the country, the product of growth or manufacture. The object of such service is to improve the quality of the articles and fit them for exportation or for domestic use. The tax or duty necessary for the execution of inspection laws—using the term in the sense now described—would be in the nature of a fee or fixed compensation paid for this service.

§ 309. The first of a series of cases in the Supreme Court of the United States giving construction to the clauses in question is that of *Brown v. The State of Maryland*.<sup>1</sup> The legislature of Maryland had passed a statute requiring all importers of foreign goods by the bale or package, to take out a license for which they were to pay a prescribed fee; and in case of refusal they were to be subjected to certain penalties. The constitutionality of this act was brought before the court, and the statute was held to be invalid, because it did, in fact, impose a duty on imports, and it was not claimed to be in aid of any measures that are included within the general description of inspection laws. The opinion of the court, given by C. J. Marshall, is too long to be quoted or condensed, and will be referred to again in Section III. of this chapter. One im-

<sup>1</sup> 12 Wheaton's R. 419.

portant rule was laid down which must not, however, be passed by in this connection. An article authorized by Congress to be imported, continues to be a part of the foreign commerce of the country, while it remains in the hands of the importer for sale, in the original bale, package, or vessel, in which it was imported. The authority given to import necessarily implies the right to sell the imported article in the form and shape in which it was imported; and no state, either by direct assessment or by requiring a license from the importer before he is permitted to sell, can impose any burden upon him or the property beyond what the law of Congress itself had imposed. But when the original package is broken up for use or for retail by the importer, and also when the commodity has passed from his hands into the hands of a purchaser, it ceases to be an import, or a part of foreign commerce, and may be taxed for state purposes.

§ 310. In the year 1847 the Supreme Court considered and determined a series of cases known as the License Cases.<sup>1</sup> The facts were somewhat complicated, and varied in the different cases. I shall not attempt to state these facts at large. It is sufficient to say that the controversies arose under the license laws respectively of Massachusetts, New Hampshire, and Rhode Island. These statutes required a license fee for the sale of spirituous liquors, although they might have been imported, but did not apply to the importer himself. The cases turned upon the validity of these statutes. Two objections were urged against them, namely, that they laid duties upon imports; and that they assumed to regulate commerce. The state laws were sustained. The question most elaborately argued by counsel and considered by the court, was, whether these statutes were void because they interfered with the power of Congress to regulate commerce. The license fees imposed by them were plainly not duties upon imports, within the meaning of the rule laid down in *Brown v. Maryland*.

§ 311. The Passenger Cases<sup>2</sup> decided in 1849, were in many respects extraordinary. An attempt was made to commit the court to the state sovereignty doctrine, and to overturn

<sup>1</sup> 5 Howard's R. 504.

<sup>2</sup> 7 Howard's R. 283.

many of the decisions which had upheld the supremacy of the general government. The attempt, however, failed. The case holds that statutes of New York and of Massachusetts imposing a tax upon alien passengers arriving within those states were void, although the proceeds of the tax were appropriated to maintain marine hospitals.

In *Cooley v. The Port Wardens*,<sup>1</sup> a law of Pennsylvania, imposing certain fees upon vessels, payable to the Master Warden, for the use of decayed pilots, was upheld; the impost was not a duty upon imports. Both of these cases, however, are principally important as they affect the subject of commerce.

The most recent judgment of the Supreme Court is found in *Almy v. The State of California*.<sup>2</sup> It held that a statute of California imposing a stamp on bills of lading of gold exported from that state created a duty on exports, and was therefore void.

§ 312. The cases which have been referred to show that the Supreme Court of the United States, at an early day, took high national ground upon the subject of taxation by the states, and has never receded from that position. On the other hand, it has given a fair and equitable construction to the exceptions contained in the organic law, and has allowed to the separate commonwealths as free and full exercise of the great function of taxing as is necessary for their existence as subordinate political societies.

## SECTION II.

### THE POWER TO BORROW MONEY.

§ 313. The second general grant of legislative power contained in Section VIII. of Article I. is in these words: "Congress shall have power . . . to borrow money on the credit of the United States." In this immediate connection should be read a clause of Section X., as follows: "No state shall emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts."

<sup>1</sup> 12 Howard's R. 299.

<sup>2</sup> 24 Howard's R. 169.

But few questions strictly legal in their character have arisen, or can arise, under this provision authorizing Congress to borrow money. The language is as broad as possible; it contains in itself no limitations. The extent of the borrowing power must be, and is, commensurate with the wants of the government. For whatever purposes money may be expended, money may be borrowed to meet the expenditure. Nay, even though the money should be appropriated by Congress to some object, or in some manner, not warranted by the organic law, this act of transgression could not, according to any principles of law or justice, invalidate the arrangement by which such money might have been borrowed. It cannot be that the public creditor is bound to see that the national legislature makes a proper use of the moneys loaned to it. Practically, therefore, the capacity of Congress to borrow money is absolutely unlimited; questions respecting its use are questions of policy and not of constitutional power.

§ 314. By what particular methods and measures may Congress exercise the power of borrowing? The answer is easy. Applying the rule which, as has been shown, is applicable to all the general grants of the Constitution, Congress may adopt such means as it thinks best, which are conducive to the efficient execution of the power; may pass all laws which have a tendency to make the provision operative. The government may go into the market and ask loans from capitalists in exchange for its evidences of debt, whatever form those evidences may assume, — scrip of stock, bonds, treasury notes, certificates of indebtedness, and the like. This has been the usual mode, but it is by no means the only one in which money can be borrowed. Of course the legislature may also adopt all ancillary measures which have the effect to render its obligations more certain and secure in the hands of public creditors; it may declare certain acts to be crimes, and affix punishments upon the offenders. As a long series of decisions made by the Supreme Court has settled the rule that the states may not tax the public securities of the nation in the hands of owners, *a fortiori* Congress has power by a declaratory statute to exempt them from such taxation.



§ 315. But the power to borrow money may be exercised by the use of measures and methods whose relation to the end proposed does not seem to be so immediate and direct as in the cases last referred to. At a very early day in our history it was thought proper to establish a United States Bank, for the purpose of assisting the government in the management of its finances. The right in Congress to create such an institution was partly rested upon the general grant of power to borrow money; the bank was said to be a means conducive to this end, — a legitimate measure for the execution of this attribute. I do not purpose to enter into the discussion of the question whether Congress has authority to charter such a bank; much less to inquire into the policy of such an act. It is enough to say that the Supreme Court has most deliberately affirmed the power in the great cases of *McCulloch v. Maryland*,<sup>1</sup> and *Osborn v. The Bank of the United States*;<sup>2</sup> and the rule may be considered as settled in that court, and of course in the state tribunals.

The validity of the statute creating the present system of National Banks must be rested upon the same principles. Indeed, these institutions seem to have a more intimate connection with the function of borrowing money, and to be a more direct means of exercising that function. A large proportion of their capital must be invested in the national securities, and thus a very extensive demand for those securities is created, and borrowing by the government is made easier.

§ 316. But another and much more difficult question has arisen. Congress, impelled by what were considered to be the necessities of the situation, resorted to a measure which would hardly have been accepted under the ordinary circumstances of peace. In the exercise of its power to borrow money, the legislature provided for the issue of treasury notes designed to circulate generally as money. No question has been raised, no doubt has been expressed, as to the legality of this act. These notes are not different in kind from certificates of stock, or bonds; they are promises to pay, and therefore evidences of debt. Paying them out by the government

<sup>1</sup> 4 Wheaton's R. 316.

<sup>2</sup> 9 Wheaton's R. 738.

for value received by it of some kind, is really and directly borrowing money. Had the statute, therefore, stopped here, not a suspicion could have been cast upon its validity. But Congress went further, and declared that these notes should be a legal tender for the payment of all debts due to the United States, with a few specified exceptions; and also for the payment of all private debts. In respect to one of these provisions there can be no dispute: the government may lawfully make these its promises a legal tender in payment of debts to itself. This point is universally conceded. Indeed, the legislature has, from time to time, since the adoption of the Constitution, resorted to such an expedient, and its authority to do so has never been denied. The controversy upon the statute is narrowed down to a single question: Is the provision declaring these treasury notes to be a legal tender in the payment of private debts, a lawful and constitutional exercise of any general power conferred upon Congress?

§ 317. The Supreme Court of the United States has not as yet formally considered this subject, and passed upon the legality of the measure. In several of the state courts, however, cases necessarily and directly involving the question have arisen and been decided. In some of these courts the authority of Congress to enact the legal tender clause has been positively affirmed, in others as positively denied.<sup>1</sup> In the cases of *Metropolitan Bank v. Van Dyck*, and *Meyer v. Roosevelt*,<sup>2</sup> decided by the Court of Appeals in New York, the whole subject was examined in a most thorough and exhaustive manner, and it is proper to state in outline the arguments by which the court and the dissenting judges respectively reached their conclusions. The authority of the legislature to affix the compulsive attribute of legal tender to the treasury notes was rested upon the general grant of power to borrow

<sup>1</sup> The following are some of the cases reported: In favor of the validity, *Thayer v. Hedges*, 23 Indiana R. 141; *Brown v. Wilch*, 26 Indiana R. 116; *Lick v. Faulkner*, 25 California R. 404; *Hintrager v. Bates*, 18 Iowa R. 174; *Van Husen v. Kanouse*, 13 Michigan R. 303. Opposed: *Thayer v. Hedges*, 22 Indiana R. 282.

<sup>2</sup> 13 Smith's (27 N. Y.) R. 400.

money. The position was first broadly taken that any means and methods which conduce to the end permitted by the organic law, are themselves legitimate; that Congress is the sole judge as to such means; that treasury notes are evidences of debt, and issuing them is in fact borrowing money; that the peculiar attribute annexed to them has a natural and direct tendency to enhance their value, to give them greater efficacy as a circulating medium, and is therefore a measure by which the borrowing of money is made easier. The case was held to be completely within the spirit of those decisions of the national court which declared the public securities of the government to be free from state taxation. One judge, Mr. Justice Marvin, also thought that the authority of Congress might be referred to its power to regulate commerce. The objection that the statute operated directly to impair the obligation of contracts, was met by two answers: In the first place, the position was denied; in the second place, it was claimed that Congress was not forbidden to pass laws impairing the obligation of contracts. Two eminent judges dissented — Mr. Justice Denio and Mr. Justice H. R. Selden. Their views were briefly as follows: After admitting that Congress might issue treasury notes designed for circulation as money, and might declare them to be legal tender in payment of debts to the government, they denied that any authority existed to force these notes upon private persons in payment of private debts. They urged that a particular measure of legislation, to be within the scope of Congressional powers, must have some direct relation to the end which the Constitution expressly authorizes; that it is not sufficient for such relation to be merely incidental or speculative. They claimed that the compulsive attribute annexed to these evidences of debt had no direct relation with the power to borrow or the act of borrowing. They chiefly relied, however, on the position that Congress has no capacity to interfere with the private contracts of individuals, any further and in any other manner than is directly authorized by the organic law; that the control over private agreements is a matter peculiarly within state jurisdiction.

§ 318. The several states, as bodies politic, have also the capacity and power to borrow money to any extent they may deem proper. The Constitution of the United States places no restrictions upon them in respect to the amount of their loans, — although their own constitutions very generally restrain their legislatures by very positive and minute provisions. But the several states are limited by the organic law in respect to the means which they may adopt for borrowing money. They may not issue bills of credit, or make any thing but gold and silver coin a tender in payment of debts. The states are thus forbidden to emit their treasury notes or other evidences of indebtedness designed to circulate as money; nor may they affix the legal tender attribute to their obligations of any form, or to the obligations of banks or private individuals.

§ 319. The considerations which led to the adoption of these and other similar limitations upon the power of the several states, were very clearly and concisely stated by Mr. Justice Marvin, in *The Metropolitan Bank v. Van Wyck*, already referred to. He says: <sup>1</sup> “Considering the subject or object of these powers, and the circumstance that the people were members of other bodies-politic possessing certain powers in common with all independent states, which powers, if exercised by them, would embarrass, derange, and might effectually destroy, the common system established by the federal government, it was absolutely necessary to impose certain prohibitions upon these other bodies-politic — the states. Among these prohibitions I have always regarded — so far as the peace of the states and the harmony of the system are concerned — those which prohibit the states from making any thing but gold or silver coin a tender in payment of debts, and from passing any law impairing the obligation of contracts. [*A fortiori*, that which forbids the issuing of bills of credit.] If these powers had been suffered to remain with the states, it is quite obvious that difficulties between the people of different states would soon have arisen, endangering peace and harmony between them. Distrust would have existed, and

<sup>1</sup> 13 Smith's (27 N. Y.) R. 515.

there would have been an absence of that confidence necessary as a base for commercial and other intercourse between them. Independent nations may protect their merchants and citizens from the frauds of other nations consequent upon a debasement of the coin or a change of the measures of value in which debts are to be paid [or the depreciation of a national paper currency], or for a neglect or refusal to pay, by a resort to war. But the states have no right or power to make war upon each other, and they are prohibited from doing certain things which might be a just cause of war; and the people have entrusted the regulation of these subjects to a general common government."

§ 320. The meaning of the term "bills of credit," as used in the Constitution, has been settled by the judgments of the Supreme Court of the United States. Bills of credit plainly do not include all written contracts by which a state binds itself to pay money at a future day in consideration of services rendered, or loans made. Should this broad signification be given to the term, the states would practically be deprived of the ability to borrow money. Certificates of public stock, and public bonds, do not, therefore, fall under the prohibition. Bills of credit are written evidences of debt, payable at a future day, issued and intended to circulate as money. Nor is it necessary that the state should declare them to be money, or to be receivable in payment of debts, or to be a legal tender. It is sufficient that they be issued by the state, on its credit, and designed and made appropriate for circulation through the community. This definition and description was formally given by the Supreme Court of the United States in the case of *Craig v. The State of Missouri*,<sup>1</sup> in which it was held that certain certificates issued by state officers, although not made a legal tender, or directed to pass as money or currency, were bills of credit, and that a statute of the state authorizing their issue was void.

§ 321. The question again arose in a subsequent case, *Briscoe v. The Bank of the Commonwealth of Kentucky*.<sup>2</sup> The State of Kentucky had incorporated the bank, and declared it

<sup>1</sup> 4 Peters' R. 410.

<sup>2</sup> 11 Peters' R. 257.

to be "in behalf of the commonwealth." The president and directors were to be chosen by the legislature. The bank was authorized to issue notes which were to be receivable in payment of debts to the state. Other provisions of the statute disclosed the intimate connection between the bank and the state government, and the virtual control of the institution by the latter. The Supreme Court, notwithstanding a very vigorous dissent from Mr. Justice Story, held the notes of the bank not to be bills of credit, and the statute authorizing their issue not to conflict with the prohibition of the Constitution. The grounds of this judgment were, that the bank and the state were distinct; that the notes were issued by the former, upon its credit alone, and could only be enforced against it; that they were not issued by the state, and contained no pledge of the state's credit. The same view was taken in *Darrington v. The Bank of Alabama*,<sup>1</sup> in reference to a bank of which the state was the only stockholder. It seems difficult to sustain the power of a state to permit any bank, whether a private or governmental institution, to issue circulating notes; for what the state cannot do directly, by its own immediate act, it should not be able to do indirectly, by means of an institution created by itself.

### SECTION III.

#### THE POWER TO REGULATE COMMERCE.

§ 321. The next great power conferred upon Congress is that relating to commerce. The constitutional grant is in the following words: "Congress shall have power . . . .  
3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Upon this general grant a limitation is placed: "No preference shall be given, by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." Many of the provisions on the subject of taxation, both relating to the nation and to the states, which were cited and com-

<sup>1</sup> 13 Howard's R. 12.

mented upon in Section I. of this chapter, have also an intimate connection with the subject of commerce. The laying and collection of duties on imports and exports, with all the necessary retinue of incidents, are plainly a part of the means appropriate to the regulation of commerce.

§ 322. One great cause of the utter prostration of business in the Confederation which preceded the present Union, was the fact that the Congress had no power whatever over the subject of commerce. Each state made such laws as it saw fit. Under the injurious and destructive influence of state pride, unseemly rivalries sprang up; one commonwealth competed with another; one attempted by more favorable navigation laws and reduced duties, to increase its own trade at the expense of its sister states. There was no unity, no bond of common feeling or interest.

It will also be remembered that the very first movement towards an amendment of the original Articles of Confederation, consisted in a proposal to give Congress more enlarged powers over the subject of commerce. When the convention finally assembled, it was universally conceded that this matter, at least, must be committed to the general government.

In considering the grant of power to regulate commerce, I shall arrange the various questions in order in two general divisions: first, The nature of the power; or whether it rests solely in the nation, or is shared also by the several states; and, secondly, The extent of the power; or what particular measures Congress may adopt in execution thereof.

#### First. *The Nature of the Power.*

§ 323. We are to inquire whether the power to regulate commerce is lodged exclusively in Congress, or whether it is held concurrently by the nation and the states. There are three theories of constitutional construction. (1.) One theory regards the capacity as vested, by the mere language of the Constitution, exclusively in Congress; and asserts that the states may enact no laws which are, in fact, regulations of commerce, whether or not the national legislature has passed

statutes on the same particular subject. (2.) A second theory denies that the power is exclusive, and insists that the states may at all times proceed to regulate commerce, even though Congress has already assumed to act. In other words, this theory maintains, as a general doctrine of constitutional construction, that United States laws and state laws touching the self-same subject-matter may exist side by side, and be executed together, except in the few cases where the several states are expressly forbidden to legislate. (3.) The third theory is, in a measure, a compromise between these two extremes. It concedes that when Congress has acted, and while its statute remains operative, the states are debarred from taking any steps on or about the subjects embraced within the national legislation; but insists that when Congress has not acted in reference to any particular subject-matter involved in the general grant of power, the field is open for state legislation. In other words, this system of construction denies that the mere constitutional grant *ipso facto* confers exclusive jurisdiction upon the national legislature; and declares that only the provisions of the organic law, and the statute of Congress passed in pursuance thereof taken together, can vest the entire control over the subject in the general government.

§ 324. I shall not stop to discuss the second of these theories. It is the direct outgrowth of that more general system of interpretation which would make the states sovereign, and the Union a partnership. If generally adopted, it would soon bring back the calamitous condition of the early Confederacy. It has never been assented to by a majority of the Supreme Court, or by many of the state tribunals. A few judges only have asserted and maintained this dogma.

The other theories have each been supported by eminent judges, jurists, and statesmen. I think that the Supreme Court of the United States has hardly been consistent upon this point. At an early day some of its members plainly and unequivocally advocated the construction that the grant of power to regulate commerce was, by its very terms, absolutely exclusive; that the states could, in no case, assume to exercise it. It has often been claimed that the court itself was



committed to this position, although the claim has been opposed. Certainly at a later period the court abandoned this high ground, and gave in its adherence to the third system of interpretation. In the very latest reported case involving the relations of the nation and the states to each other, (1865,) language is used which would seem to imply that the Supreme Court had receded still further from its ancient doctrine, and was willing to accord greater powers of legislation to the states than had previously been allowed. It may be, however, that the change is not in the formal statement of the rule, but in its application under new circumstances to new states of fact.

§ 325. What is the commerce which Congress has the power to regulate? C. J. Marshall devotes a considerable space in one of the cases to be quoted hereafter, to prove that commerce includes not only traffic, or the interchange of commodities, but navigation, or the transit of goods from one country to another. Hautefeuille, one of the latest French writers on international law, labors with some diligence to show that commerce consists not only in navigation or transit, but also in interchange or traffic.<sup>1</sup> It would seem that both these propositions were self-evident. In fact, the word as commonly used, and as employed in the Constitution, expresses two ideas, embraces two elements, both necessary to its full meaning, navigation or transit, and interchange or traffic. Regulations of commerce, therefore, may be rules governing, or applying to, either or both these elements; they are no less regulations of commerce because they relate to but one. A statute making rules respecting the ownership and use of shipping is a regulation of commerce, although it affects one element only, that of navigation; a statute providing for the deposit of imported goods in public bonded warehouses, is also a regulation of commerce, although it applies only to the other element, interchange or traffic. These propositions are sustained by all the cases which involve the question, as will be seen in the sequel.

§ 326. But the Constitution does not confer upon Congress an absolute and unlimited power over commerce. Only that with foreign nations, among the several states, and with the

<sup>1</sup> *Droits et Devoirs des Nations Neutres*, tom. 1, tit. 2.

Indian tribes is placed under the control of the national legislature. The transit and traffic, therefore, which are entirely within the boundaries of a particular state, are completely subject to the jurisdiction and legislative capacity of that state. Congress has no direct power over them, and no power at all except such as may result incidentally from the exercise of some other attribute. But when the transit or traffic passes from one state to another, or when it passes from any portion of the country to a foreign nation, the power of regulation by Congress comes in play, to be exercised at will. As a fact, the legislature has availed itself of its function in respect to foreign commerce to such an extent as to shut out all opportunity to act by the several states. Commerce between the states has not been thus completely subjected to national legislation.

§ 827. Before proceeding to consider in detail the relations between the general government and the states, it will be proper to ascertain the reasons which led the framers of the Constitution and the people to confer the power over commerce upon Congress. These reasons will aid us in giving a correct construction to the instrument; they will throw light upon the intention of those who made and adopted the organic law, and upon the meaning of the language they used. The particular grounds which were decisive in favor of the provisions in question, are stated in a most accurate, condensed, and simple manner by Mr. Justice Marvin, and I shall not hesitate to quote his language.<sup>1</sup> "There existed at the time of the adoption of the Constitution thirteen states, and it was understood that this number would be increased. Each of these states possessed powers common to all independent nations, — of regulating their own commerce and the law of contracts; of making money or declaring what should constitute money; and, of course, what should pay debts. They could emit bills of credit; issue their own paper money, and make it receivable in payment of debts. They could discriminate, in regulating commerce, in favor of their own citizens, and against the citizens of other states or nations. Under such

<sup>1</sup> Metropolitan Bank v. Van Dyck, 18 Smith's (27 N. Y.) R. 508.

circumstances it was obvious, indeed it was already proved, that there could be no such thing as harmony touching any of those matters. Most of the then states possessed harbors upon the ocean, and were engaged in foreign commerce, and commerce among themselves. There could be no uniformity of regulations touching such commerce. Some of the states tried to agree upon a system among themselves, and failed. The system of one state would nullify the system of another. Free importations by one state would render impracticable the systems of other states imposing duties for revenue or for the protection of home industry. Embarrassing and unreasonable regulations touching commerce between the citizens of one state and those of other states would be made. Each state might have a moneyed system unlike that of any other state. Commerce between the citizens of one state and those of other states might be prohibited and destroyed. The confederacy had no power to derive a revenue from importations, nor had the states practically this power, as they would never be able to agree upon a common system, and owing to their geographical positions, any system other than free trade would be practically nullified by the action of the other states.

§ 328. "This state of things could not last. The people were powerless to protect their interests. A change was necessary, if they were to indulge hopes of future prosperity. This practically powerless condition of the people was an important, if not the most important, reason for making an effort to devise a remedy; and the remedy devised was the Constitution. A leading object of the Constitution was to get rid of all conflicting commercial interests, and, as to commerce, to effect a union of all the people of all the states, great and small, and make them one people, one nation, without divided interests, and without the power, as states, to produce divided interests or conflicts. This was a leading idea in favor of the Constitution, and to me it has always seemed the most valuable one.

"Was this idea carried into effect by the Constitution? I think it was clearly and fully. It required several provisions to effect the object; some conferring powers on the new gov-

ernment; others prohibiting the exercise of certain powers to the state governments. Hence were granted the powers: to regulate commerce with foreign nations, among the several states, and with the Indian tribes; to establish uniform laws on the subject of bankruptcies throughout the United States; to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. The prohibitions upon the states, in connection with commerce, are, that they shall not lay duties on imports and exports, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts. These provisions, I think, accomplish the object intended, namely, the committing to Congress, the common representative and agent of all the people, the exclusive power to establish a uniform system of commerce throughout the United States. All these powers have a very important connection with, and relation to, commerce, over which the common government was to exercise great, if not exclusive, control for the common benefit of all the people of all the states."

§ 329. We are now prepared to examine with care the most important question proposed to ourselves, — what capacity to legislate on the subject of commerce resides in the nation and in the states respectively? Or, in other words, is the power to regulate held by the general government exclusively, or is it shared by the local commonwealths? So far as the decisions of the ultimate tribunal upon constitutional interpretation now stand, the following propositions seem to be established: (1.) The several states have power to pass laws regulating the internal police of their own territories, which territories include navigable rivers and harbors, as well as unnavigable streams, and the land itself. These police measures are not, in any true sense of the term, regulations of commerce, although they may sometimes have direct reference to shipping, to the condition of harbors and other instruments by which commerce is carried on, or to the commodities themselves which are the objects of interchange and traffic. They are simply a part of the general system by which each state endeavors to protect the good morals, lives, health, persons,

and property of its inhabitants. Thus, if a state legislature, deeming it dangerous to permit poisons to be sold without restriction, should pass a statute requiring a license from the druggist, or placing him under any other species of restraint, such law would be unobjectionable, although certain poisonous substances, as opium, are chiefly or wholly the products of foreign countries, and therefore the objects of commerce. Again, most of the states have enacted statutes prohibiting the sale of spirituous liquors in certain quantities, and at certain times and places, except by those persons who have complied with the provisions of the statute, and have received licenses for that purpose. Such laws are within the power of the states to pass. This entire class of statutes establishing police regulations is within the purview of state legislation, whether Congress has legislated for the same or similar purposes or not. Among them may be mentioned laws establishing quarantine, licensing and controlling pilots, declaring the order in which ships shall come to wharves and docks, regulating the use of wharves and docks, managing the internal order of harbors, licensing the sale of spirituous liquors, poisons, and the like.

§ 380. (2.) In respect to measures which are properly, though perhaps indirectly, regulations of commerce, if Congress, proceeding under the general power conferred upon it, has already legislated upon any subject connected with foreign commerce, or with that among the states, the several states are entirely deprived of any authority over the same subject-matter; they are entirely cut off and debarred from the exercise of the legislative function; the prior occupation of the field by the national legislature excludes any participation therein by the individual states. But if Congress have not legislated; if their power as given by the Constitution lies dormant, the states are free to act; their action, however, is not absolute and final; it is only conditional; it is constantly subject to be displaced by the laws of Congress, if that body should see fit to exercise its power, and regulate the particular subject.

All the cases are agreed as to the correctness of this proposition; but in its application there may be some diversity;

nor can the decisions of the Supreme Court be perfectly reconciled. This discrepancy arises, not from any difference in the statement of the rule, but from the different meanings which have been attributed to it. In most of the cases decided by the Supreme Court, it has been held sufficient to displace the state authority, if Congress had legislated so as to cover the subject-matter in a general way; if the relation of the national legislation to the object contemplated by the state law was indirect and incidental. One or two cases, however, and several judges, seem to have so construed the rule as to require that Congress should directly legislate upon the self-same subject-matter as that contained in the state statute, in order that the latter should be ineffectual.

§ 331. In the latest reported case — to be cited hereafter — the Supreme Court of the United States has expressed the rule governing the relations of the nation and the states in an entirely different form; although it was probably not the intention of the court to introduce any new principle. It was there said: The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states. But even in respect to this latter class of rules and provisions, Congress may interpose whenever it shall be deemed necessary by general or special laws; and their interposition would sweep away the local state legislation. Within the sphere of their authority, both the legislative and the judicial powers of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

§ 332. I shall now add an abstract of the cases which have been decided in the Supreme Court of the United States, and from which the foregoing propositions have been derived. As many of these judgments are among the ablest and most celebrated ever emanating from that high tribunal, I shall refer to

them with some particularity, and extract from them with some fulness. This course is adopted the more readily, because the opinions of the judges, while the most authoritative expositions of the Constitution, contain nothing which is technical; they may be appreciated and understood by any intelligent citizen as well as by the professional lawyer; and they deal in questions of the greatest magnitude, — questions which lie at the bottom of schemes of policy and of political controversies, and involve the very nature of the government itself.

√ § 333. *Gibbons v. Ogden: Facts and question at issue.* — The case first in point of time (1824), and most important in principle, is that of *Gibbons v. Ogden*.<sup>1</sup> The facts were few and brief. The State of New York, by a statute of its legislature, gave to Robert R. Livingston and Robert Fulton the exclusive right to navigate all waters within the jurisdiction of the state with vessels propelled by steam, for a certain term of years. Gibbons, notwithstanding this statute, navigated the bay of New York with a steamboat running between New York City and Elizabethport in New Jersey, which steamboat had been duly enrolled and licensed as a coasting vessel, under the acts of the United States Congress regulating the coasting trade. Ogden, who had succeeded to the rights of Livingston and Fulton, commenced a suit in the New York courts to restrain this proceeding of Gibbons. The state courts having decided in favor of Ogden's claim, and having held the statute of New York valid, an appeal was taken by the other party to the Supreme Court of the United States. The contention on the part of Gibbons was, that the New York statute contravened the clause of the Constitution which confers upon Congress the power to regulate commerce among the states, and was therefore void. This proposition was denied by Ogden; and the issue thus raised was the only one to be decided by the court.

§ 334. *The Arguments.* — The cause was argued with the utmost learning and ability by Mr. Webster and Mr. Wirt for Gibbons, and by Mr. Oakley and Mr. Emmet for Ogden. We may well assume that the arguments on both sides were exhausted.

<sup>1</sup> 9 Wheaton's R. 1.

In support of the New York statute it was urged, (1.) that the act in question did not interfere with the prerogatives of Congress, as it was not a regulation of commerce, but only a police regulation analogous to those respecting quarantines and pilots. (2.) That Congress had no exclusive power at all over the subject, but that the power was absolutely concurrent in the national and state legislatures, so that by no possibility could there arise a conflict of jurisdiction. (3.) That if the latter proposition was overruled, still the power was held by the states concurrently, and they might legislate thereby, unless Congress had already legislated upon exactly the same subject-matter as that over which the state had assumed control; and that as Congress had never legislated in regard to the navigation of state waters with steamboats, the statute in question was valid.

On the other side it was contended: (1.) That the New York law was a regulation of commerce, and the powers of the national government were discussed at large. (2.) That the jurisdiction of Congress was absolutely exclusive, or at least, (3.) That Congress having legislated upon the general topic of navigation, and prescribed certain steps to be taken in order to entitle a person to employ his vessel in the coasting trade, — namely, the procuring it to be enrolled and licensed, — no state had authority to add any further conditions to the use of a vessel.

§ 335. *Opinion of the Court. Extent of the power to regulate. How far exclusive.* — The opinion of the court was delivered by C. J. Marshall, and is confessedly one of his masterpieces. It should be diligently read by all students of our Constitution and civil polity. I shall only quote the salient points.

After speaking of the meaning and nature of commerce, and the sort of rules which Congress may legitimately ordain by virtue of the constitutional grant, the Chief Justice proceeds to meet the important question under consideration. He says:<sup>1</sup> “We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by

<sup>1</sup> 9 Wheaton's R. 196.



which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar.” . . . . “But<sup>1</sup> it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. . . . . The appellant [Gibbons] contends that the full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.” The Chief Justice then proceeds to show that there is no analogy between the power of taxation, and the power to regulate commerce. Congress has general power to tax; and yet it is universally admitted that the states may also tax. The reason is that the Constitution recognizes the states as bodies-politic, and to their very existence as such, the power to lay and collect taxes is absolutely essential, while the power to regulate commerce is not. No argument can, therefore, be drawn from the conceded concurrent power of the states to exercise the function of taxation, in favor of a like concurrent jurisdiction over commerce. Having disposed of this apparent analogy, the Chief Justice proceeds:<sup>2</sup> “In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the *mere grant* to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations, and among the states, while Congress is regulating it?”

<sup>1</sup> 9 Wheaton's R. 197.

<sup>2</sup> Ibid. 200.

§ 836. *Powers held by the States. How far they interfere with those held by Congress.* — The Chief Justice continues: <sup>1</sup>

“But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use. They act upon a subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces every thing within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.

It is obvious that the government of the Union in the exercise of its express powers, — that, for example, of regulating commerce with foreign nations, and among the states, — may use *means* which may also be employed by a state in the exercise of its acknowledged powers, — that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the powers expressly granted to Congress, and implies no claim of a direct

<sup>1</sup> 9 Wheaton's R. 266.

power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

§ 337. *Conclusions of the Court.* — Proceeding to apply these general principles, the Chief Justice discusses and decides the following propositions. (1.) That<sup>1</sup> the laws of New York in question are in collision with the acts of Congress regulating the coasting trade, which being made in pursuance of the Constitution are supreme; and the state laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the states. (2.) That<sup>2</sup> a license under the acts of Congress for regulating the coasting trade, gives a permission to carry on that trade. (3.) That<sup>3</sup> the act of Congress applies as well to steam as to sailing vessels. The decree appealed from was unanimously reversed, and the statute of New York declared unconstitutional and void. Mr. Justice Johnson also delivered an opinion in which he went even further than the Chief Justice; for he held that though Congress had passed no statute regulating the coasting trade, the State of New York would have had no authority to give the exclusive right of navigating the waters in question to any of her citizens, or to any particular persons whatever.

§ 338. I have quoted thus largely from this case, because it is one of the grand landmarks of constitutional interpretation which have been placed along the course of our political his-

<sup>1</sup> 9 Wheaton's R. 210.

<sup>2</sup> Ibid. 212.

<sup>3</sup> Ibid. 219.

tory ; one of those decisions so fruitful in results, that it may be said to contain within itself the germs of all future development.

It is very important, however, to ascertain exactly what the case decided ; for what legal propositions it is an authority. And (1) it did not decide that the mere grant to Congress of power to regulate commerce with foreign nations, etc., *ipso facto*, excluded the states from the exercise of a like power ; although much of the reasoning of C. J. Marshall plainly leads to that conclusion. (2.) It did decide that the grant contained in the Constitution, together with legislation of Congress in pursuance thereof, inhibited the states from interfering with the subject-matter of the congressional legislation. (3.) It also decided, that the subject-matter thus withdrawn from the state jurisdiction, need not have been the direct object of the national legislation, need not have been the self-same thing with which that legislation was concerned ; but it was sufficient if the subject-matter were incidentally and indirectly within the scope of the congressional acts.

§ 339. *Brown v. Maryland : Facts and question at issue.* — The next case in order, (1827,) and one which has always been considered as leading, both by those who assent to it, and by those who oppose it, was *Brown v. The State of Maryland*.<sup>1</sup> That state had enacted a statute requiring all importers of foreign goods by the bale or package, and other persons selling the same by the wholesale, bale, or package, to take out a license, for which they should pay a certain fee ; and in default thereof, they should be subject to certain fines and other penalties. *Brown*, having violated this statute, was indicted thereunder, and demurred to the indictment on the ground that the state law was unconstitutional and void. The courts of Maryland having rendered judgment against him, he carried the case to the Supreme Court of the United States. It was there urged that the statute in question was void, because it contravened (1) the provisions of the Constitution forbidding states to lay duties on imports ; and (2) those granting to Congress the power to regulate foreign commerce. The case

<sup>1</sup> 12 Wheaton's R. 419.

has already been cited to illustrate the first of these positions,<sup>1</sup> and it is only now to be examined in reference to the second.

§ 340. *Opinion of the Court. Extent of the power to regulate.* — The opinion was delivered by Chief Justice Marshall. After arriving at the conclusion that the statute was void on the first ground, he proceeds to say:<sup>2</sup> “Is it also repugnant to that clause of the Constitution which empowers Congress to regulate commerce with foreign nations and among the several states?” Describing the degraded and disorganized condition of commerce during the confederation, and the fact that one of the powerful incentives for the adoption of the Constitution, was the desire to remedy this great evil, he continues:<sup>3</sup> “It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.”

§ 341. *Foreign commerce includes the sale of imported articles.* After quoting some propositions from *Gibbons v. Ogden*, he adds:<sup>4</sup> “If this power reaches the interior of a state and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse, one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, therefore, as importation itself. It must be considered as a component part of the power to regulate com-

<sup>1</sup> See § 309.

<sup>3</sup> *Ibid.* 446.

<sup>2</sup> 12 Wheaton's R. 445.

<sup>4</sup> *Ibid.* 446.

merce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

§ 342. *States cannot interfere with the Importer's right to Sell.*—The Chief Justice further proceeds: <sup>1</sup> "What would be the language of a foreign government which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced, that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense; it is placed elsewhere. The question is, Where does the power reside? not, how far will it probably be abused. The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised, does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation as an inseparable incident, is inevitable. If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress, which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce; since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."

The judgment of the Maryland court was reversed; the state statute was declared unconstitutional and void. From this decision Mr. Justice Thompson dissented.

§ 343. The case of *Brown v. Maryland* reaffirms in the most

<sup>1</sup> 12 Wheaton's R. 447.

emphatic manner, the several propositions stated in § 338. For here the acts of Congress regulating, and therefore permitting importation, were held to be so complete an exercise of the power granted to the national legislature, as to preclude the states from interfering with the sale of the goods by the importer. It should be noticed that the laws of Congress were entirely silent upon the subject of sale.

§ 344. *Wilson v. Blackbird Creek Company: Facts and Question at issue.* — The next case in order of time (1829), was that of *Wilson v. Blackbird Creek Company*.<sup>1</sup> The case, though not elaborately considered by the court, is important, and has been made the precedent for subsequent decisions involving matters of more intrinsic magnitude. It came up from the highest court of Delaware. The company had been incorporated by a statute of that state, and were the owners of marsh land bordering upon the Blackbird Creek, a small stream connecting with the ocean, and in which the tide ebbed and flowed. They were authorized to make a dam across the creek, and to embank the marsh, the design being to reclaim the land. They proceeded to construct the dam by which the navigation of the stream was interrupted. Wilson, being owner of a sloop licensed and enrolled under United States statutes, broke and injured the dam, and was sued by the company for damages. Wilson justified his trespass by setting up his license and enrolment, and his right to navigate the creek, and that the dam was an unlawful obstruction to his right which he might and did remove. To his defence the company demurred, and the only question arising was as to the validity of the state statute. The court of Delaware held the statute valid, and overruled the defence. Wilson, thereupon, carried the case to the Supreme Court of the United States.

§ 345. *Opinion of the Court.* — The opinion of the court was delivered by C. J. Marshall. He says:<sup>2</sup> “The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up

<sup>1</sup> 2 Peters' R. 245.

<sup>2</sup> Ibid. 250.

which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiff in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign nations, and among the several states. If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks into which the tide flows, we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This is the entire opinion. The judgment was affirmed; and the state statute held valid.

§ 346. A consequence and effect have been attributed to this short case, which Chief Justice Marshall probably never dreamed of; for, as will be seen in the sequel, some of the judges have claimed that it formally overrules *Gibbons v. Ogden*, and *Brown v. Maryland*, and abandons the principles of interpretation settled by those celebrated judgments. It can-



not be denied that much of the language of C. J. Marshall here used, can with difficulty be reconciled, not only to particular expressions, but to the whole course of his argument in those former decisions. The difficulty is not, that he rejects either the first or the second of the propositions stated by me in § 338; both are included in his opinion; but he seems to greatly modify the third. He now requires that Congress should have legislated in respect to this creek, or the class of streams to which it belongs, in order that the authority of the state over the same subject should be destroyed; it is not sufficient now that Congress should have legislated upon the general subject of navigation. Compare this case with that of *Gibbons v. Ogden*. In both, the persons attacking the state law were owners of a vessel licensed for the coasting trade; in both, the place affected by the state legislation was a navigable stream, lying within the state territory, in one case a great affluent of the ocean, in the other an insignificant tidal creek; in both the states attempted to interfere with the free navigation of these streams, the one by imposing further conditions upon the navigator, the other by cutting off all access whatever. Yet in *Gibbons v. Ogden*, the general legislation touching the navigation of the coast was deemed enough to oust the jurisdiction of the state; while in *Wilson v. The Blackbird Creek Company*, legislation touching the stream itself seems to be required. I repeat that it is difficult to reconcile these cases; and it is just as difficult to suppose that Chief Justice Marshall would have swept away the doctrines he had elaborated with such a wealth and cogency of reasoning, without so much as a passing reference, even, to the former decisions.

Probably the best explanation of the Blackbird Creek case is that given by Mr. Justice Clifford, in *Gilman v. Philadelphia*.<sup>1</sup> He says of it: "Judgment was rendered in that case by the same court which gave judgment in the case of *Gibbons v. Ogden*; and there is not a man living, I suppose, who has any reason to conclude that the constitutional views of the court had at that time undergone any change. Instead of

<sup>1</sup> 3 Wallace's R. 743.

overruling that case, it will be seen that the Chief Justice who gave the opinion did not even allude to it, although as a sound exposition of the Constitution of the United States, it is second in importance to no one which that great magistrate ever delivered. Evidently he had no occasion to refer to it or to any of its doctrines, as he spoke of the creek mentioned in the case as a low, sluggish water, of little or no consequence, and treated the erection of the dam as one adapted to reclaim the adjacent marshes and as essential to the public health, and sustained the constitutionality of the law authorizing the erection, upon the ground that it was within the reserved police powers of the state."

This explanation removes all appearance of conflict from these three decisions of C. J. Marshall; without it they cannot fairly be reconciled.

§ 347. *New York v. Miln: Facts and Question at issue.* — Following the chronological order, the next case which we meet is, *The City of New York v. Miln*,<sup>1</sup> (1837.) This case is very important, as it fully considers what police regulations are within the jurisdiction of the states to adopt, although they may have connection with commerce. The action was brought in the circuit court of the United States held in New York. That state had passed a law providing, among other things, that every master of a vessel arriving at New York City from a foreign country, or from a port in another state, should, within twenty-four hours, make a report in writing, containing the names, ages, and last place of settlement of every passenger; and in default thereof should be liable to certain penalties to be sued for by the city of New York. The defendant, Miln, was the master of the ship *Emily*, and having arrived with passengers, and having failed to make the required report, was sued by the city of New York. Miln defended the suit on the ground that the statute of New York assumed to regulate commerce between the port of New York and foreign ports, and was unconstitutional and void. This was the sole question brought before the Supreme Court for decision. The cause was argued twice. After the first argument, and before

<sup>1</sup> 11 Peters' R. 102.

the decision, Chief Justice Marshall died, and his place was supplied by the appointment of C. J. Taney. A second argument was thereupon had.

§ 348. *Opinion of the Court: Police Powers of the States.* — The opinion of the court was delivered by Mr. Justice Barbour. He says: <sup>1</sup> “It is contended by the counsel for the defendant, that the act in question is a regulation of commerce; that the power to regulate commerce is, by the Constitution of the United States, granted to Congress; that this power is exclusive; and that consequently the act is a violation of the Constitution. . . . The plaintiffs deny that it is a regulation of commerce; on the contrary, they assert that it is a mere regulation of internal police, a power over which is not granted to Congress; and which, therefore, as well upon a true construction of the Constitution, as by force of the tenth amendment to that instrument, is reserved to, and resides in, the several states. We shall not enter into any examination of the question whether the power to regulate commerce be, or be not, exclusive of the states, because the opinion we have formed renders it unnecessary. In other words, we are of opinion that the act is not a regulation of commerce, but of police; and that, being thus considered, it was passed in the exercise of a power rightfully belonging to the states.”

§ 349. *Nature of Police Powers.* — The court continue: <sup>2</sup> “If, as we think, it be a regulation, not of commerce, but of police, then it is not taken from the states. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment. It is apparent from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, etc., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers. Now we hold that both the end, and the means here used, are within the competency of the states.” The justice then discusses the

<sup>1</sup> 11 Peters' R. 131.

<sup>2</sup> Ibid. 132.

application of *Gibbons v. Ogden*, and *Brown v. Maryland*, to the present case. The conclusion arrived at was, that they had no applicability.<sup>1</sup> In commenting on the case of *Brown v. Maryland*, the learned justice said, speaking of the principles therein laid down by Chief Justice Marshall :<sup>2</sup> “ But how can this apply to *persons*? They are not the subject of commerce ; and not being imported goods, cannot fall within a train of reasoning founded upon a construction of a power given to Congress to regulate commerce, and the prohibition of the states from imposing duties on imports.” The argument of the court is finally summed up :<sup>3</sup> “ But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these : That a state has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States : that, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to those ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated : that all these powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained ; and that, consequently, in relation to these the authority of a state is complete, unqualified, and exclusive.”

The New York statute was declared valid. From this decision Mr. Justice Story very earnestly and emphatically dissented. With his opinion he stated that Chief Justice Marshall had agreed.

§ 350. In my opinion the decision of the court upon the facts of this case was correct, although many of the dicta in the opinion of Mr. Justice Barbour cannot be supported. The law of New York seems clearly to fall within that mass of

<sup>1</sup> 11 Peters' R. 133-136.

<sup>2</sup> Ibid. 136.

<sup>3</sup> Ibid. 138.

supervisory measures, which are collectively termed regulations of police. The case is quite plainly distinguishable from *Brown v. Maryland*. In the latter case, the state legislation acted upon the objects of commerce, and placed a new restriction upon the incorporation of imported goods into the general property of the state: the New York statute did not interfere with the transit and landing of passengers; it only required information as to those who should land, and thus become added to the number of inhabitants. The dictum of Mr. Justice Barbour, that persons cannot be the objects of commerce, was not necessary to the decision of the case, was plainly incorrect, and, as we shall see, was directly overruled by a subsequent judgment of the same court.

§ 351. *The License Cases: Facts and Questions at issue.*—Following in order of time (1847) are the license cases.<sup>1</sup> There were three cases: *Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, and *Peirce v. New Hampshire*. In each, a person was indicted under a state statute forbidding the sale of spirituous liquors without a license. In Massachusetts the statute forbade the sale of spirituous liquors in less quantities than twenty-eight gallons, unless the seller be licensed. In Rhode Island the statute was similar, and the person indicted had sold French brandy purchased directly from the original importer. In New Hampshire the statute was similar, and the person indicted had sold a barrel of American gin, purchased by himself in Boston, and carried coastwise to a port in New Hampshire, where it was sold in the original package. The objection urged against each of these statutes was that it contravened the Constitution and the acts of Congress passed thereunder.

§ 352. *Decision of the Court.*—In these cases a strong attempt was made to commit the court to the theory that jurisdiction over commerce is, in all cases, concurrent in the nation and in the states. It is absolutely impossible, however, to say what the court decided. Although all the judges came to the same conclusion,—that the state laws were valid,—hardly two, much less a majority, agreed in the reasons for their judgment, and the rules of law applicable to the cases.

<sup>1</sup> 5 Howard's R. 504.

I have no doubt that all these state laws were valid; they were plainly police regulations, established to preserve the health and morals of the citizens. Rested upon this ground, the license cases would appear to be simple enough. But this easy solution did not satisfy some of the judges. The result was, that Chief Justice Taney, Mr. Justice Daniel, Mr. Justice Woodbury, and Mr. Justice Grier, each delivered one opinion applicable to all the cases; Mr. Justice McLean three opinions, one in each case; Mr. Justice Catron two opinions, one in the Massachusetts and Rhode Island, and one in the New Hampshire case. I will endeavor to state, in a very brief way, the positions of each of the members of the court.

§ 358. *Opinion of Taney, C. J.* — The Chief Justice speaks first of the Massachusetts and Rhode Island cases. In each the liquor sold was imported, but in neither of them was the defendant the importer. The Chief Justice adopted the doctrines announced in *Brown v. Maryland*; approved of that case, and held that the liquor having passed beyond the hands of the importer, had become a part of the general property of the state, and was subject alone to the power of the state to regulate purely internal commerce, and to pass police laws. The New Hampshire case presented a different state of facts. The barrel of gin was bought by the defendant in Boston, carried by sea to New Hampshire, and there sold by him in bulk. The article had, therefore, formed a part of the interstate commerce. Chief Justice Taney remarks that the facts here are quite different from those in *Brown v. Maryland*, the state statute in the latter case applying to all foreign goods, in respect to the importation of which Congress had fully legislated. But Congress had not legislated in regard to goods carried from one state to another; the navigation laws did not apply to the goods which may be transported, but only to the vessels which transport; the foreign importation statutes cover the introduction of articles from abroad, but no corresponding statute applies to traffic among the states. In the opinion of the Chief Justice the question was therefore directly presented, whether the mere grant to Congress of power to regulate commerce was exclusive and prohibitory

upon the states, or whether it requires a statute of the national legislature, passed in pursuance of such grant, to oust the states of jurisdiction. He adopted the latter of these views, and therefore held the law of New Hampshire valid. The case which he principally relied upon, as confirmatory of his doctrines, was *Wilson v. Blackbird Creek Company*.

This judgment of Chief Justice Taney, in its general scope and conclusion, cannot be successfully criticized; it seems to be in harmony with prior and subsequent decisions, and to fall completely within the propositions stated in § 338.

§ 354. *Opinion of McLean, J.* — Mr. Justice McLean, in his opinion upon the Massachusetts case, first takes the same position as the Chief Justice, holding that, as the defendant was not the importer, he was not protected by *Brown v. Maryland*. His principal ground, however, was, that the license law of the state was simply and strictly a police regulation. As I have already said, this appears to be the rational doctrine by which this and all similar controversies may be easily determined. The opinion in the Rhode Island case was identical with that given upon the Massachusetts statute.

In the New Hampshire case, the learned judge, while not accepting all the reasoning and conclusions of the Chief Justice, held that a person buying goods in one state, and carrying them to another, there to sell, is not, in any proper sense, an importer; and that it is not to be understood that such goods are free from state laws, even while in the hands of the very purchaser who brought them within the territory.

§ 355. *Opinion of Catron, J.* — Mr. Justice Catron, in the New Hampshire case, rejects the doctrine that the statute was within the police powers of a state; holding that if states may thus put restrictions upon the introduction of goods under such an assumed authority, they might absolutely prohibit the importation of those articles which they should pronounce to be deleterious, and thus the power of Congress to regulate commerce would be defeated. He puts his decision on the ground taken by Chief Justice Taney, namely, that the power in Congress is not exclusive until that body has acted; and not having acted, the door was open for the state legislature to pass

such regulations of commerce as it saw fit. In the other cases, Mr. Justice Catron agreed with the Chief Justice, that the goods having passed beyond the importer, were under the exclusive control of the state government.

§ 356. *Opinion of Daniel, J.* — Mr. Justice Daniel was the impracticable member of the court; a true, consistent advocate of state sovereignty of the strict Calhoun school. He was entirely dissatisfied with the reasoning of all the other judges. He held that the court had always been wrong; that Congress had no exclusive power under any circumstances; that regulating commerce does not include the power to make rules respecting imported goods, but should be confined to the means of transportation, — the registry of ships, etc.; that, instead of these state statutes being void, most of the laws of Congress were unconstitutional.

Mr. Justice Nelson agreed with Chief Justice Taney and Catron, J. Mr. Justice Woodbury more nearly agreed with Daniel, J. He seems to have argued that the judgment in *Brown v. Maryland* was wrong; that states have the power to pass laws which place a restriction upon the introduction even of foreign goods.

§ 357. In reviewing these extraordinary license cases, it is plain that the court did not overrule the former decisions of *Gibbons v. Ogden*, and *Brown v. Maryland*. On the other hand, it would appear that five of the justices, Taney, Catron, Daniel, Nelson, and Woodbury, concurred in the proposition that it requires, at least, a statute of Congress, passed in pursuance of the general grant of power in the Constitution, to inhibit the state legislatures from enacting laws which regulate commerce; while two of the justices, McLean and Grier, did not adopt this view; two, Daniel and Woodbury, pushed their conclusions much further; and two, Wayne and McKinley, were absent, or took no part in the decision. Whatever rule, however, was established by this judgment, was entirely unsettled by the next cases which came before the same high tribunal for adjudication.

§ 358. *The Passenger Cases: Facts and Questions at issue.* These are known as the Passenger Cases,<sup>1</sup> (1849.) There

<sup>1</sup> 7 Howard's R. 283.



were two cases, *Smith v. Turner*, on error from New York, and *Norris v. The City of Boston*, on error from Massachusetts. Smith and Norris were respectively sued in the courts below; judgments were recovered against them, which each sought to review. The same legal questions was involved in each case. A statute of New York provided that the health officer of the port of New York should be entitled to demand, sue for, and recover from the master of every vessel that should arrive at that port, certain sums for each steerage passenger brought to that port from a foreign country, or from another state. The moneys thus received were to be applied towards the support of a marine hospital. Masters were subjected to certain penalties if they neglected to make the prescribed payment. A statute was passed in Massachusetts similar in its general scope and important features, but differing somewhat in detail. Smith was sued in New York, and Norris in Massachusetts for violating these laws. The only defence set up in each case was the unconstitutionality of the state statute. On the other hand, the contention was that the provisions of these legislative acts were merely rules of internal police, and that the cases were identical in principle with that of *Miln v. The City of New York*; also, that states have authority to pass such laws, even assuming them to be regulations of commerce.

The whole doctrine of constitutional construction was examined at great length by the counsel; and a violent effort was again made both at the bar and on the bench to recede from the earlier decisions, and to pronounce the jurisdiction of the states over commerce virtually concurrent with that of the general government. The attempt was signally and finally defeated. Five members of the court, McLean, Wayne, Catron, McKinley, and Grier, agreed in pronouncing the state laws void, and they also agreed in the reasons for that conclusion. Four members, Taney, Daniel, Nelson, and Woodbury, dissented, holding the laws valid.

§ 359. *Opinions of the Judges.* — Mr. Justice McLean reached two conclusions, namely, that the power of Congress to regulate commerce is exclusive; and that the state statutes

under review are regulations of commerce. In discussing the second of these propositions, he is obliged to consider the extent of the police powers which a state may lawfully hold and wield; and the question whether persons are the objects of commerce. He holds that they are, and rejects the contrary dictum of Barbour, J., in *Miln v. New York*.

Mr. Justice Wayne delivered an opinion, in which, after remarking that he does "not think it necessary to reaffirm, with our brother McLean, what this court has long since decided, that the constitutional power to regulate commerce is exclusively vested in Congress, and that no part of it can be exercised by a state," added that he fully believed such to be a correct interpretation of the Constitution. But he thought it sufficient then to say that Congress had legislated on the subject, so that the state laws in question were repugnant to the acts of Congress. He formally expressed his agreement with the judgment of McLean, J.

Mr. Justice Catron gave an elaborate opinion in which he held these state laws to be in direct conflict with statutes of Congress passed under their power to regulate commerce. Mr. Justice McKinley concurred with McLean and Catron, JJ., in their whole reasoning, and then proceeded to express these views in his own language.

Mr. Justice Grier also elaborately examined the questions, holding the laws under review not to be police regulations; that persons were objects of commerce; that Congress had legislated, covering the ground occupied by these local acts, and that the latter were therefore void. He did not discuss the more general topic whether the mere grant to Congress of the power to regulate commerce inhibits the states, deeming that a mere abstract inquiry of no practical value in the cases before the court.

§ 360. *Points decided in this Case.* — Five judges, therefore, agreed, (1.) That when Congress has passed a statute by virtue of its general power to regulate commerce, the states are absolutely prohibited from making any laws which will interfere with the exercise of national authority; and this is true although the two schemes of legislation are not directed

to the self-same subject-matter. (2.) That persons as well as goods are the objects of commerce. (3.) That the conceded power to adopt regulations of internal police does not enable the states to pass laws similar to those under review. These conclusions, thus reached after a long and somewhat bitter contest, are in entire harmony with the propositions drawn from *Gibbons v. Ogden*, and *Brown v. Maryland*, and stated in § 338.

The grounds of the dissenting judges were numerous; the general concurrent power of the states; the authority to pass police regulations; a denial that persons can be the objects of commerce, and the consequent result that Congress has no authority to legislate respecting the importation of persons, that matter being left exclusively to the states. These were the important positions adopted and enforced by the minority.

This was the last great contest in the Supreme Court between the forces of national and of state sovereignty. The national idea was triumphant through the steadiness of two southern members of the court, Wayne of Georgia, and Catron of Tennessee.

§ 361. *Cooley v. The Port Wardens*. — In 1851 the case of *Cooley v. The Wardens of the Port of Philadelphia*<sup>1</sup> was decided. It involved the question whether states may pass laws establishing and regulating pilots, and prescribing certain duties to the masters of vessels arriving in port, in respect to such pilots. It was urged that this power was exclusively in Congress under the general grant to regulate commerce. The opinion of the court was given by Mr. Justice Curtis, and here we shall find the court beginning to state the general rule in a form somewhat different from that which it had used since the time of *Gibbons v. Ogden*. The judgment of the court held, that pilot laws are regulations of commerce; that the power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others, different rules in different localities; that the power is exclusive in Congress in the former, but not so in the latter class; that Congress had not legislated so as to establish any

<sup>1</sup> 12 Howard's R. 299.

common system of pilotage, but on the contrary had exhibited a plain intention to leave this matter to the several states; that there being no act of Congress, the statute of Pennsylvania should be upheld. The whole scope and tenor of the reasoning in this judgment concedes that Congress may pass systems of pilot regulations, and that, in such case, the several states would be deprived of their jurisdiction.

§ 362. It cannot be claimed that the case of *Cooley v. The Port Wardens*, in any degree lowers the standard of the national authority, and exalts that of the states. In fact, the rule as here stated, is even stronger than had ever before received the sanction of the court. For it is declared that in respect to one class of commercial regulations, the power of Congress is, *ipso facto*, exclusive, whether the power be exercised or not; but in respect to another class of regulations, the power is only exclusive when Congress shall have acted under it, and until such action, the states have a concurrent jurisdiction. Whatever individual judges may have said, the court had never before gone further than to assert the latter rule in respect to all species and classes of commercial regulations.

It is evident, also, that the decision is in complete harmony with the prior cases in the same court. Pilot laws are regulations of commerce; they also fall within the department of police rules, for they relate to the well-ordered government of harbors, and of vessels therein. As Congress had passed no general statute on the subject of pilotage, and no statute applying to the Port of Philadelphia, the door was open for state legislation. It would be a very forced construction to say that the navigation and importation laws covered this subject-matter.

§ 363. *Pennsylvania v. The Wheeling Bridge Company*. — In 1851 was first decided the case of *Pennsylvania v. The Wheeling Bridge Company*.<sup>1</sup> The facts necessary to our purpose were few. The State of Virginia had incorporated the defendants, and authorized them to construct a suspension bridge across the Ohio River at Wheeling, which had been done. The State of Pennsylvania, deeming her public inter-

<sup>1</sup> 13 Howard's R. 518.

ests injured by this bridge, brought a suit in the Supreme Court, praying that the bridge might be removed as a nuisance. The first question discussed and decided was one of jurisdiction merely, whether the suit could be maintained. This was answered in the affirmative, but as it is entirely foreign to our present inquiry, I pass it by. It appeared, in fact, that the bridge did hinder the passage of boats ascending and descending the river to and from points above; and at certain stages of water entirely prevented the transit of large boats. It also appeared that Congress had repeatedly recognized the Ohio as a navigable stream and channel of commerce, but had never enacted any laws touching the erection of bridges over that watercourse. The plaintiff claimed that the bridge was a nuisance, and that its owners, the company, could not justify their injury by an appeal to the act of the Virginia legislature, because that statute, in authorizing a bridge which did, in fact, hinder free commerce on the Ohio, was prohibited by the power given to the general government, and laws passed in execution thereof.

§ 364. *Judgment of the Court.* — These positions were adopted by the court, which held, that the power to regulate commerce among the states extends to the navigable streams whereon that commerce is carried; that commerce includes navigation; that Congress had recognized the Ohio as a great navigable river, and the highway of an immense commerce; that the bridge interfered with such navigation; that the Virginia statute authorizing the bridge was therefore in conflict with the power granted to and exercised by Congress.

Chief Justice Taney dissented, on the ground that Congress had passed no statute respecting the erection of bridges over the Ohio. Mr. Justice Daniel, of course, dissented. The decree of the court was that the bridge should be removed, unless within a certain time it should be raised to such a height as to admit all steamers at all stages of the water.

§ 365. *Pennsylvania v. The Bridge Company (No. 2).* — After the foregoing judgment had been given, Congress passed a statute legalizing the bridge in its then condition, and ordering it to stand at its then height. The question, therefore,

arose whether this act was within the scope of the congressional authority.<sup>1</sup> The court held, that Congress, having power to regulate commerce, might place obstructions upon its free exercise, — which they are constantly doing, — and assuming the bridge to be such an obstruction, the act of the national legislature was not an undue exercise of power.

§ 366. This case is important in both its aspects. The first decision reaffirms in the most emphatic manner the doctrines of *Gibbons v. Ogden*; and directly and pointedly holds that the national legislation need only embrace in a very general and incidental manner the subject-matter covered by the state law, in order to avoid the latter. Here Congress had never uttered a word or promulgated a rule respecting bridges; it had only recognized the Ohio as a navigable stream over which commerce is carried on. Yet this recognition was deemed a sufficient act under the power to regulate commerce; and the state authority to erect a bridge, which should interfere with that commerce, was destroyed.

§ 367. *Smith v. Maryland*. — The case succeeding in order of time was *Smith v. The State of Maryland*.<sup>2</sup> The territorial limits of Maryland include part of Chesapeake Bay below low-water mark. These waters furnish a habitat for oysters, and the fishery thereof is an important branch of industry. A law of the state forbade persons to fish for oysters with a scoop or drag, under certain penalties. Smith, the owner of a vessel enrolled and licensed as a coasting vessel, under the laws of the United States, violated the Maryland statute, and the action was brought to recover the penalty. The sole defence was the invalidity of the state legislation. The court held it to be valid; to be a mere exercise of territorial jurisdiction, or in other words, of jurisdiction over the soil of which the state was the paramount owner.

§ 368. *Sinnot v. Davenport*. — In *Sinnot v. Davenport*,<sup>3</sup> the Supreme Court unanimously held that a statute of Alabama requiring the owners of steamboats navigating the waters of that state, before such boats can leave the port of Mobile, to

<sup>1</sup> See *Pennsylvania v. Bridge Company*, 18 Howard's R. 421.

<sup>2</sup> 18 Howard's R. 71.

<sup>3</sup> 22 Howard's R. 227.

file a statement in writing setting forth the name of the vessel, the name of the owner, and his place of residence, and the interest of each owner, was wholly void and inoperative, so far as it applied to steamboats enrolled or registered under the laws of the United States. An endeavor was made by the counsel representing the State of Alabama, to convince the court that the statute was a mere regulation of police; but the attempt entirely failed, and *Gibbons v. Ogden* was upheld and followed.

§ 369. *Gilman v. Philadelphia*. — We now come to the most recent case decided by the Supreme Court of the United States, a case which is certainly in conflict with some of the former adjudications which have been referred to, *Gilman v. Philadelphia*.<sup>1</sup> The important facts are as follows: The Schuylkill River divides the city of Philadelphia, and empties into the Delaware; it is tidal for about seven and a half miles from its mouth, and is navigable for vessels drawing from eighteen to twenty feet of water; there is a very extensive commerce in coal upon it, which employs a large number of barges and small steamers that are enrolled and licensed under United States laws. There are, and have long been, bridges across it within the limits of the city, some with draws, others permanent. The plaintiff was the owner of coal wharves on this river, below any bridge, and carried on an extensive business, but was not a navigator, or the owner of licensed vessels. The City of Philadelphia was authorized by a statute of the Pennsylvania legislature to erect, and was proceeding to erect, a new bridge across the river, below all the others, and below the plaintiff's wharves. This bridge would be a public convenience; but being permanent, and only thirty feet above the water, it would greatly interrupt the navigation of the river, would absolutely prevent masted vessels from passing it, and would be a serious interruption to the plaintiff's business. Congress had established the district of Philadelphia, including "all the shores and waters of the River Delaware, and the rivers and waters connected therewith, lying within the State of Pennsylvania," and had made the City of Philadelphia the

<sup>1</sup> 3 Wallace's R. 713.

port of entry for such district. The plaintiff sought by this suit to restrain the city from building the contemplated bridge.

§ 370. *Opinion of the Court.* — The opinion of the court was given by Mr. Justice Swayne. He laid down the general rule which I have already stated in § 331; and in its application stated that the erection of bridges fell within the second class of commercial regulations, over which the states have jurisdiction, unless Congress should deprive them of that authority by legislating upon the same subject. As Congress had never passed any statute touching the erection of bridges over such streams as the Schuylkill, the power of the states was unlimited. The case mainly relied upon by the court was *Wilson v. Blackbird Creek Company*.

Mr. Justice Clifford delivered an elaborate dissenting opinion, in which Wayne and Davis, JJ., concurred. He took the ground that Congress had already sufficiently legislated to cover the subject-matter and to deprive the state of power to build the bridge in question. This legislation consisted in the navigation laws, which, as had been repeatedly held, enable vessels registered or enrolled and licensed to enter all navigable waters free from state interference; but especially in the statute declaring Philadelphia to be a port of entry. He asserted that *Wilson v. Blackbird Creek Company* had no application; because the statute of Delaware was upheld in that case as a measure of police, a means to reclaim marsh lands and improve the health of the neighborhood.

§ 371. I cannot refrain from saying, that the dissenting opinion of Judge Clifford is a most overwhelming answer to the positions taken by the court. Laying out of view the Blackbird Creek case, the judgment in *Gilman v. Philadelphia* is opposed to the whole scope and tenor of all prior decisions, and is in direct conflict with *Pennsylvania v. Wheeling Bridge Company*. Indeed, these two cases are absolutely identical in their facts; in each the plaintiff sought to protect his rights as proprietor on the banks of the river above the bridge; in each a state, by its statute authorizing a permanent bridge, had interfered with those rights; in neither had Congress directly



legislated upon the subject of bridges. Yet the court overthrew the statute of Virginia, and upheld that of Pennsylvania; they deliberately adopted, in the Philadelphia case, the position of Chief Justice Taney in the dissenting opinion which he delivered in the Wheeling case, although in the latter Congress had only acted by *recognizing* the Ohio as a navigable stream, while in the former, Congress had directly legislated by declaring Philadelphia to be a port of entry. I repeat that, while it cannot be supposed the court intended to overrule the long series of great and most ably considered cases which have been referred to in the foregoing sections, they have placed themselves in antagonism to many of those decisions.

§ 372. Is there any explanation of this seeming inconsistency, this departure from old landmarks? I think there is, and that it is hinted at in one sentence of Mr. Justice Swayne's opinion: <sup>1</sup> "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable rivers, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs." The court was pressed with the fact that the internal commerce of the country, carried on upon railways, had grown to such an enormous size as to entirely outweigh in importance the traffic upon most inland waters although navigable. If these navigable streams cannot be bridged, the actual commerce among the several states will suffer vastly more than it would were these interior streams to be made absolutely impassable. The court was forced, therefore, to do substantial justice by a somewhat illogical and inconsistent process.

§ 373. This subject of bridges, authorized by state laws to be built over navigable streams, deserves a little further remark. Two cases may arise: (1.) The stream may be technically navigable, but Congress may not have established any port of entry upon it at or above the point where the proposed bridge or obstruction is to cross; in other words, may

<sup>1</sup> 3 Wallace's R. 729.

not have legislated in respect to this particular stream. (2.) The river may be navigable and Congress may have established a port of entry at or above the point where the proposed obstruction is to cross ; in other words, may have legislated in regard to this particular water-course. Each case may, again, present itself under two aspects : the bridge may be a complete and permanent obstruction and entirely prevent the passage of vessels used in commerce ; or it may only hinder and delay without prohibiting, such transit. When the latter circumstances exist, there arises a question of fact ; the amount of hindrance and delay must be determined. If this amount be not substantial, there is certainly no interference by the state with the prerogatives of the national legislature. When the former circumstances exist, when the hindrance is permanent and complete, the Wheeling Bridge case and the Philadelphia Bridge case will apply. The Supreme Court cannot, however, be supposed to have established, as a general rule, that a state may entirely obstruct the navigation of its streams connecting with the ocean, whenever Congress has not expressly legislated in reference to bridge-building. It cannot be supposed that New York may permit a bridge to cross the Hudson River, or the East River, between Brooklyn and New York City, in such a manner as to materially hinder, delay, or in any way interfere with the immense traffic which passes over those streams.

§ 374. I have thus abstracted all the decisions and judgments of the national tribunal of last resort which involve the questions under discussion. It will be seen, I think, that they fully support the propositions stated in §§ 330-332 and § 338. No apology is needed for this long analysis. The constitutional construction which we have examined, embraces subjects of the utmost importance and magnitude ; it has engaged the attention of the ablest men who have adorned the bar or the bench ; it has called forth the most animated discussions of counsel, and the most profound judgments of the court ; it involves the capacities and functions of the national and state governments ; its determination and settlement have led to the

establishment on a sure and firm basis of the legislative power of the United States.

2 Second. *The Extent of the Power.*

§ 375. I am now brought to the consideration of the second division into which the whole subject was separated: The extent of the power to regulate commerce; or, what particular acts may Congress pass by virtue thereof?

The dicta, opinions, and judgments already cited partially answer this question; but we have been virtually considering what the states may do; we now ask what may Congress do? Very few cases have arisen in which this question has been directly presented to the Supreme Court, and the validity of the national legislation been passed upon. Whatever has been said by the judges, has generally been by way of argument or illustration. It is true, in *Brown v. Maryland*, the course of his reasoning led C. J. Marshall to examine the power of Congress to regulate the importation of goods; the *Passenger* cases established its power over the introduction of persons; the *Wheeling Bridge* case determined that it might maintain a bridge over a navigable stream flowing through or between two or more states.

§ 376. As an introduction to the subject under discussion, I will quote some remarks of C. J. Marshall on the extent of the power of Congress to regulate commerce, which he made in the great case of *Gibbons v. Ogden*. He says:<sup>1</sup> "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying or selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce undoubtedly is traffic; but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is

<sup>1</sup> 9 Wheaton's R. 189.

regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of vessels of one nation into the ports of the other, and be confined to the prescribing rules for the conduct of individuals in the actual employment of buying and selling or barter."

§ 377. Again:<sup>1</sup> To what does this power extend? The Constitution informs us, to commerce with foreign nations, and among the several states, and with the Indian tribes. It has, we believe, been universally admitted, that these words comprehend every species of intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said, that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it.

The subject to which the power is next applied is, to commerce among the several states. The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, or which does not extend to or affect other states. Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more states than one."

§ 378. These propositions, so clearly conceived, and so forcibly stated by the great Chief Justice, have remained unanswered, a constant guide to the courts in interpreting the Constitution, and to Congress in legislating under it. What

<sup>1</sup> 9 Wheaton's R. 193.

laws, then, may Congress pass under this general grant of power?

The two controlling words are "commerce" and "regulate." We are to fix the meaning of these terms, and then apply the general principle, that the grant of power includes all the means which are appropriate for making it effective.

Commerce is a word of very wide signification. It includes the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places, by and in which intercourse and traffic are carried on; and, further still, comprehends the act of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things — goods, chattels, merchandise — or persons. All these may therefore be regulated.

Intercourse and traffic need not be carried on over the ocean, or waters naturally navigable connecting with the ocean. Inland lakes and rivers, artificial canals, roads, turnpikes, and railways, are channels for intercourse and traffic; and commerce carried on by these means, — growing every day in importance, — if foreign or inter-state, is as much the subject of regulation by Congress as that transacted over the highway of nations.

"Regulating" means prescribing rules for carrying on the matter regulated; which rules may either place restraints and hindrances upon the free conduct of the intercourse and traffic, or may remove all restrictions upon the free enjoyment and exercise thereof. Whether Congress shall adopt one or the other of these systems, and propose to itself one or the other of these ends, is entirely a matter of policy, with which courts have no concern.

§ 379. Under this analysis we shall discover that Congress has power to pass laws regulating

(1.) *Places* where traffic and intercommunication with foreign nations and among the several states may be transacted; the ports at which ships may enter, discharge, load, be registered, be cleared, and the like; also laws in relation to

the improvement of harbors, the clearing out of navigable rivers, the construction of lighthouses, piers, breakwaters, levees, and all such other accessories and appendages to the mere places for carrying on commerce, by which those places are made more fit and convenient for the purpose. I have no doubt that Congress has full power to build or repair the levees of the Mississippi River, and thus to regulate commerce among the several states. These and such measures have been adopted and carried out from the commencement of the present government; the authority of the legislature has been disputed by verbal theorists; but the acquiescence in their propriety is now universal.

§ 380. (2.) *The means and instruments* by which traffic and intercommunication may be carried on. Under this head are included that mass of statutes which collectively are known as the "Registry" and "Navigation" laws. The policy of such acts is to favor American shipbuilders and owners. They give the entire coasting trade to American bottoms; they prohibit the importation of foreign goods in any but American ships, except the vessel be owned by citizens of the country in which the goods were grown or manufactured, or which contains their usual place of export. To compel the observance of this policy, they require all American bottoms engaged in the foreign trade to be registered in such a manner that the maker, the owners, and the master shall distinctly appear; and those engaged in the coasting trade to be enrolled and licensed. They forbid any vessel to enter or depart from our ports without official papers showing its nationality, ownership, destination, and the object of its voyage.

§ 381. Other statutes, passed under the same exercise of legislative power, regulate the use and conduct of the ships themselves; provide for the safety of crew and passengers by prescribing rules concerning boilers, engines, medicines, bulk, ventilation, and the like; also the number of the crew, the form and nature of their contract of hiring, their rights as against masters and owners; the powers of officers, etc. The number of such statutes is great, and their particular objects are numerous. Some require the appointment of new classes

of official persons, such as inspectors of steamboats, etc. No one has, as yet, questioned the authority of Congress to enact such laws.

§ 382. But may Congress, under the general power to regulate commerce among the states, establish, construct, or authorize the construction of bridges, roads, canals, or railways? In the first place, it is to be remarked, that if the commerce which is to be affected or regulated by the bridge, railway, or other means of transit, be entirely within the boundaries of a state, Congress has no jurisdiction over the subject; the state authority is complete. But if that commerce be foreign or inter-state, I think the power in the national legislature exists. Indeed, we hardly yet know the scope and efficacy of our supreme organic law; the results which may be reached by applying the general principles announced by the tribunal of last resort. That court has decided that Congress may maintain a bridge erected over a navigable stream running between several states; and if it may maintain, it may also cause to be erected. The prevailing opinion in *Gilman v. Philadelphia* not only assumed, but plainly declared, that the legislature might provide for bridging such streams as the Schuylkill, although they may be entirely within the territory of a single state, since they are navigable from the ocean. Indeed, Congress has several times exercised this authority by authorizing bridges to be constructed over the Mississippi River.

It would seem that the same principles apply to the establishment of railways and canals. The legislature of the nation has exerted but a small portion of its power to regulate commerce among the several states. It may well be that the vast and increasing importance of this intercourse and traffic, and the evil results of partial, and, to a certain extent, antagonistic state legislation, will convince the people of the advantage and even necessity of rules as uniform as those which regulate foreign commerce. When this time arrives it will be found that Congress, by applying the principles and doctrines already settled, has ample power to accomplish the desired end. It should be stated, however, that in *Conway v. Taylor's*

Lessee,<sup>1</sup> the Supreme Court held that Congress could not establish or regulate ferries.

§ 383. (3.) *The subject-matter of Commerce.* Under this head would properly fall all regulations touching the importation and exportation of particular articles and persons. It is true that Congress has done little under this branch of its authority, except in its revenue laws, which have a double relation to commerce and to taxation. There are some other illustrations of this kind of regulation. A statute is in existence controlling the importation of adulterated drugs, and providing for the inspection of medicines brought from abroad. Another law forbids the importation of immoral books, pictures, and the like.

§ 384. (4.) Statutes relating to the liabilities of ship-owners and others engaged in commerce, either declaring, altering, or supplementing the rules of the Common Law, or general Law Merchant. Congress has assumed to enact laws of this description, and having this effect. In 1851 it passed a statute entitled, "An act to limit the liability of shipowners," etc. This act provides in substance, among other things, that no owners of vessels shall be liable for any damage to goods and merchandise caused by fire on board the vessel in which the commodities are laden, unless the fire were caused by the design or neglect of the owner himself. Provisions of the same law modify the liability resulting from collisions and other negligent or wrongful acts. Here is a plain and most material change in the rules of the common law; for, under that law, the common carrier is an insurer against all loss and damage, except that caused by the act of God or of the public enemies.

The question whether this statute is valid, has never been directly presented to the Supreme Court; but it has been brought before that tribunal in such a way that their silence was as emphatic in favor of the validity as a positive and formal judgment. In *Moore v. American Transportation Company*,<sup>2</sup> the defendants ran a vessel on Lake Erie, duly enrolled and licensed as a coaster. Moore sued them for the loss of

<sup>1</sup> 1 Black's R. 603.

<sup>2</sup> 24 Howard's R. 1.



goods on board the vessel by fire. The defence was based on this statute. At the Common Law the company would plainly have been liable. The statute contains a proviso that it is not to apply to the "internal navigation" of the country. The only question discussed and decided was, whether the navigation of the great lakes was inland navigation. The court held that it was not, and that the company was free from liability. Even Mr. Justice Daniel, who dissented, and who, as we have seen, was so eager to scent any invalidity in an act of Congress, and who would so much limit the powers of that body, placed his dissent entirely upon the ground that the great lakes *do* constitute a part of the "inland navigation" of the country. As the unconstitutionality of the statute would have been a complete answer to the defence set up, and as neither Bar nor Bench suggested its invalidity, we may safely conclude that no tenable objection can be raised to it.

Alexander Hamilton maintained that, under this grant of power, Congress may pass uniform rules respecting marine insurances, foreign bills of exchange, bottomry bonds, etc., which he urged were inseparable concomitants and instruments of commerce. I can see no answer to his reasoning, if it be admitted that the national legislature may prescribe the liability of shipowners as common carriers. That a uniform system of rules governing these mercantile contracts would be a boon to those engaged in business, there can be no question.

#### SECTION IV.

##### THE POWER TO MAKE RULES FOR NATURALIZATION.

§ 385. Pursuing the order of the separate powers enumerated in Art. I. Sec. VIII., we are next to consider the following grant: "Congress shall have power . . . to establish an uniform rule of naturalization."

From the very outset of our present government, as a free, orderly, well-regulated Republic, avoiding both the iron rule of an unlimited monarchy, and the uncertainty and excesses

of an unrestrained democracy, it was foreseen that an extensive emigration from the Old World would in all probability take place; although the wildest hopes of its founders could not have anticipated a tithe of the actual steady and increasing flow of European producers to our shores, filling up our cities, and, in one generation, causing the vast West to be turned into an expanse of cultivated farm-land.

Prior to the Constitution, each state regulated the introduction and naturalization of aliens, according to its own notions of policy; there were no uniform rules; there being no national citizenship, there was no place for any power or capacity in the central government to admit persons to that status.

§ 386. With the adoption of the Constitution all this was changed. We now have citizens of the United States; and it is proper that the legislature of the nation should prescribe the methods by which those who are not naturally so, — so by birth, — may be clothed with the qualities and capacities of citizenship. And, moreover, it is of the highest importance that these modes should be uniform, — the same in all sections of the country; otherwise one state or region might obtain great and unfair advantages over another by inducements held out to foreigners in easier measures of naturalization and shorter times of probation.

Naturalization is, in fact, the conferring the status of citizenship upon those who do not acquire that status by their birth. According to the Common Law, all free persons, born within the limits of the country, are, with some unimportant exceptions, citizens. Immigrating to a country, and residing therein permanently, did not, at the Common Law, destroy the incapacities of alienage, and change a person from an alien into a citizen. Naturalization alone works this change; it makes a person "natural"; leaves him, when the transformation is wrought, as though he were a citizen by nature. It was for these reasons that the Constitution conferred upon Congress the authority to establish rules of naturalization, which must, however, be uniform.

§ 387. The first question to be considered is, whether this

power is absolutely exclusive in the United States, or whether it is enjoyed by the states concurrently. As was stated in Section III. of this chapter, there may be three alternatives, and these exhaust all possible cases. (1.) A power may be exclusively vested in Congress by the very terms of the grant, so that the states have no authority to pass laws touching the subject-matter, whether Congress has acted or not; or (2) the power may become exclusive by Congress acting thereunder; so that the states are forbidden to legislate after Congress has legislated; although, while the latter body continues silent, the states may respectively act; or (3) the power may be so concurrent that the states may exercise it, though the national legislature has also proceeded under the grant made to it in the Constitution.

It is plain that the power in question falls under the first of these alternatives; that it is exclusive in Congress; that states can pass no naturalization laws even if Congress should fail to exercise its function. The nature of the power points to this conclusion; it is national in its very essence; it is a matter with which the states can have no concern; United States citizenship is as much beyond their control as British or French citizenship.

§ 388. The decisions of the Supreme Court have established this doctrine; and the people, the political parties, the theorists, and the state legislatures have so far acquiesced, that no attempt has been made to alter or even question the construction. It is true that, soon after the adoption of the Constitution, the Supreme Court did not speak in so national a manner. In 1792 the case of *Collet v. Collet*<sup>1</sup> was decided, which drew in question the citizenship of a person naturalized under a Pennsylvania statute passed before the adoption of the Constitution. The court in a hasty manner expressed an opinion that the power to naturalize was concurrent; but they overlooked the fact that this law was enacted during the Confederation. Subsequently (1797), in the case of *United States v. Villate*,<sup>2</sup> the court decided this same Pennsylvania statute to be obsolete and void, and a person naturalized under

<sup>1</sup> 2 Dallas's R. 294.

<sup>2</sup> Ibid. 370.

it not a citizen ; but they did not consider the general question whether states might now pass such laws. In *Chirac v. Chirac*,<sup>1</sup> it was finally and definitely held that the power to naturalize is exclusively in Congress.

§ 389. In the case of *Houston v. Moore*,<sup>2</sup> Mr. Justice Story laid down general rules which are often quoted, but which, in fact, afford little aid in determining whether a particular legislative power be exclusive or concurrent. He says : " It is not to be admitted that a mere grant of powers in affirmative terms to Congress, does *per se* transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless (1) where the Constitution has expressly in terms given an exclusive power to Congress ; or (2) where the exercise of a like power is prohibited to the states ; or (3) where there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dockyards, etc. ; of the second class, the prohibition of a state to coin money, or emit bills of credit ; of the third class, as this court has already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction." In the great case of *Ogden v. Saunders*,<sup>3</sup> Mr. Justice Johnson remarks : " Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens and the protection of the American Government."

§ 390. While it is settled, then, upon principle, authority, and continuous practice, that the Congress of the United States has exclusive authority to make rules for naturalization, it must not be understood that the states are deprived of all jurisdiction to legislate respecting the rights and duties of aliens. They may permit or forbid persons of alien birth to

<sup>1</sup> 2 Wheaton's R. 259.

<sup>2</sup> 5 Ibid. 49.

<sup>3</sup> 12 Ibid. 277.

hold, acquire, or transmit property; to vote at state or national elections, etc. These capacities do not belong to United States citizenship as such. Congress would transgress its powers were it to assume to make rules upon these subjects. Citizenship of the United States implies and carries with it protection at home and abroad, as will be more particularly shown in a subsequent chapter.

The power to pass rules for naturalization has been exerted by Congress from the earliest period of its existence; but of the nature and provisions of the several statutes from time to time passed by that body, we are not called upon to speak.

## SECTION V.

### THE POWER TO ENACT BANKRUPT LAWS.

§ 391. The next grant of power is made in the following language: "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States."

In considering this subject there are, as in so many other instances, two general questions to be examined, namely: (1.) The nature of the power, or, how far, if at all, may the several states exercise it; and (2) its extent, or what laws may Congress pass by virtue thereof.

#### *I. The Nature of the Power; is it exclusively in Congress, or held also by the States?*

§ 392. The question thus proposed has been so unmistakably answered by the Supreme Court; and the decisions of that tribunal have stood so unquestioned by the partisans of every theory of constitutional interpretation; and the practice of the states in accordance with these judgments has been so uniform, that I only need refer to the cases in which the rule is established, without entering into any extended statement of the reasoning upon which it is founded.

The first and leading case was *Sturges v. Crowningshield*<sup>1</sup> (1819). This case drew in question an act of the New York

<sup>1</sup> 4 Wheaton's R. 122.

legislature passed in 1811, which had the effect, under certain circumstances, to discharge a debtor from his debts. The contention was, that this statute violated the Constitution in two particulars : (1) because a state has no power to pass bankrupt laws ; and (2) because it impaired the obligation of contracts. The court passed upon both these objections ; but we have now occasion to refer only to the first. It appeared that there was no bankrupt law of Congress in operation, although at a former time there had been such a statute in existence. C. J. Marshall delivered the opinion, in which he said :<sup>1</sup> " The principle laid down by the counsel for the plaintiff is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act upon it. Is the power to establish uniform laws on the subject of bankruptcies throughout the United States of this description ? " The Chief Justice then proceeded to answer this question, and came to the conclusion that states may enact such laws, provided there be no existing national legislation on the same subject. He then proceeded :<sup>2</sup> " It has been said that Congress *has* exercised this power ; and by doing so has extinguished the power of the states, which cannot be revived by repealing the law of Congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished ; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer that power upon the states ; but it removes a disability to its exercise which was created by the act of Congress." From this opinion there was no dissent.

In the subsequent case of *Ogden v. Saunders*,<sup>3</sup> the rule laid down in *Sturges v. Crowningshield* was reaffirmed, and may now be considered as one of the points fully established in our public law. The construction given to the power over bankruptcies, is identical with that applied to the regulation of

<sup>1</sup> 4 Wheaton's R. 193.

<sup>2</sup> *Ibid.* 196.

<sup>3</sup> 12 *Ibid.* 213.

commerce. These two cases were remarkable for the learning and ability displayed upon the question how far state bankrupt and insolvent laws impair the obligation of contracts, and are therefore obnoxious to a prohibitory clause of the Constitution. They will be referred to again in that connection.

II. *The Extent of the Power; or what Laws may Congress pass by Virtue thereof?*

§ 393. It should be carefully noticed that the Constitution employs general and somewhat peculiar language. It does not simply say that Congress shall have power to pass uniform bankrupt laws; but shall have power to pass uniform laws *on the subject of bankruptcies*. What are bankruptcies within the meaning of this phrase? In answering this question we are met, as at almost every other point, by the two schools of interpreters; the one giving a full, liberal, and comprehensive meaning to language; the other confining it to a strict and technical sense, construing the written organic law as though it were an ordinary statute, and thus limiting on all sides the power of the general government. The former system of interpretation has prevailed in this, as in most other instances; and the functions of Congress are held to be commensurate with the wants of the people. It is to be regretted, however, that no opportunity has yet occurred for this question to be fairly presented to the Supreme Court of the United States; although it has been passed upon by many or most of the circuit and district judges, and by several of the state tribunals, with a general uniformity of result. We must be content, therefore, to rest our conclusions upon the decisions of these somewhat inferior courts, and upon the practice of the legislature. Those conclusions are, however, abundantly fortified by the general maxims and principles of construction adopted and applied by the supreme constitutional tribunal in giving effect to other grants of power.

§ 394. The difficulty lies in the meaning of "bankrupt," "bankruptcies," and "bankrupt laws," and may be shortly stated thus: Do "bankrupt," "bankruptcies," and "bank-

rupt laws," as mentioned or implied in the Constitution, refer to and include the cases of all persons who are unable to pay their debts in full, and of all laws which provide for the distribution of the effects of such persons among their creditors ; or are these terms restricted to those persons who were technically known as "bankrupts," and to those laws technically described as "bankrupt laws," in the statutory legislation of England, which had been in existence for a long time prior to the adoption of the Constitution? If we go to dictionaries and to general literature, we shall find that the words "bankrupt" and "bankruptcy," in their ordinary acceptance, apply to all persons who are unable to pay their debts in full, and are, to all intents and purposes, synonymous with "insolvent" and "insolvency." If we go to the English statutes which had been in operation for several generations, and which, with some modifications, were in force when the Constitution was framed, we shall find that the word "bankrupt" was legally defined by this ancient legislation to mean only a merchant or trader who had committed some fraudulent or quasi-fraudulent act in his business ; and the word "bankruptcy" to mean only the fraudulent or quasi-fraudulent act thus done by the merchant or trader ; and "bankrupt laws" to have been only those statutes which enabled the creditors to proceed *against* such merchant or trader, divest him of his property, and distribute the same ratably in part payment of his debts.

§ 395. Which of these significations is to be given to the words used or implied in the Constitution? "Bankrupt" either means an insolvent or failing debtor, — a person unable to pay his debts in full ; and "bankruptcies" describes the act and condition of insolvency, and the proceedings which may be had thereon ; and "laws on the subject of bankruptcies" include all legislation relating to such insolvent persons, and to the proceedings in consequence of the insolvency ; or these terms are restricted to their technical sense in the ancient English statutes referred to ; there would seem to be no middle ground. The substantial provisions of those statutes were as follows : When a merchant or trader was guilty of some



specified act, which was fraudulent or quasi-fraudulent in its nature, his creditors might interfere, procure him to be declared a bankrupt, his property to be transferred to trustees, and by them distributed in part satisfaction of his debts. When this was done, he might be discharged from all further liability; or might be punished by imprisonment, as the judge should think proper from the circumstances of each case. It will be noticed that these ancient English statutes did not apply to farmers, mechanics, lawyers, and other large classes of persons, but only to merchants and traders; also, that no opportunity was given for a failing debtor to proceed voluntarily and obtain a discharge from his debts, but the initiative must be made by his creditors, and all the steps were *in invitum*, as it were, hostile to the debtor. It is true that the English system has since been greatly changed in both these respects; but such had been its character for a long period of time, and such, with some modifications, was its condition when the Constitution was adopted.

§ 396. A certain school of interpreters have urged that, when the framers of our organic law employed a word to which the English law had given a definite and technical meaning, they are to be taken as using the term in that sense alone, and that the powers conferred are to be restricted to such as flow from this special signification of the language. They apply the rule of interpretation thus stated, to the clause relating to bankruptcies, to that conferring admiralty jurisdiction, and to many others. There can be no doubt of the partial truth of this principle. All interpreters of the Constitution, judicial or legislative, are agreed, that the technical, legal terms used in those provisions which define and guard the general rights and liberties of the citizen, are to be read and enforced in the sense given to them by the common or statutory law of England, and which was familiar to our forefathers. Among such terms may be mentioned "trial by jury," "due process of law," "treason," "*habeas corpus*," "bills of attainder," "*ex post facto* laws," "pardon," and many others. But to extend this rule of construction to all grants of legislative, judicial, or executive power, would be to cripple the energies of the people,

to dwarf all development and growth, to tie up the hands of the government, and prevent any adaptation of measures to changing circumstances; in short, to arrest all progress and petrify the nation in the form and condition which existed when the Constitution was framed.

§ 397. The restricted meaning of the provision under examination has not been adopted either by Congress or by the judiciary. "Bankrupts" describe and include all insolvent debtors; and "laws on the subject of bankruptcies" are those whose principal object is to distribute the estates of such insolvents ratably among their creditors. Congress has full power to pass such laws, subject to the single condition that they shall be uniform throughout the United States. Whether the legislation shall apply to all failing debtors, or be confined to certain classes, such as merchants and traders; whether it shall release the debtor from further liability or not; whether it shall provide for a voluntary proceeding on his part, or only permit steps to be taken against him; whether it shall affect past indebtedness, or be restricted to such as shall be incurred in future; — all these are mere matters of policy, to be adopted or rejected by Congress according to its views of expediency; they are not at all involved in the definition or extent of its power; none of them are necessary to the proper exercise of its jurisdiction.

§ 398. In the year 1841, Congress passed a general bankrupt law which contained two separate systems. One, the compulsory, permitted creditors to proceed against their failing debtors under certain specified circumstances, to procure them to be declared bankrupts, and their assets distributed pro rata. The other, the voluntary, provided means for failing debtors themselves, on their own motion, against the consent of creditors, to be declared bankrupts, to have their estates ratably distributed, and themselves discharged from all further liability in respect to the claims against them. This voluntary system was not limited to merchants and traders, but extended to all debtors, except those who had been clothed with a fiduciary capacity; nor was its operation restricted to debts incurred subsequent to the passage of the act, but applied to all those con-

tracted prior thereto. The statute gave original jurisdiction to the United States District Courts to hear and determine applications made by or against the insolvent, and allowed an appeal therefrom to the circuit judges, but did not provide for any further appeal to the Supreme Court. The present bankrupt law, passed in the year 1867, resembles, in many of its general features, that of 1841, but differs greatly from the former legislation in matters of detail.

§ 399. A vast number of cases arose under the act of 1841, and were passed upon by the district and circuit judges of the United States. Objections were made to the constitutionality of the statute, on the ground that it was an insolvent, and not a bankrupt law; that it impaired the obligation of contracts by discharging debts already existing; in short, that Congress, in its passage, had transcended their powers. The same questions also came before several of the state courts which were called upon, in private suits between creditor and debtor, to decide as to the validity of the discharge in bankruptcy set up as a defence by the latter. As has been already stated, the law was generally sustained in all its parts. It is sufficient for my purpose, to cite a single case from each of these classes; and I make the selection, because in each the whole matter was very carefully and elaborately examined and discussed by the respective courts.

§ 400. The case of *In re Klein*<sup>1</sup> arose in a United States circuit court, and was decided by Mr. Justice Catron. In the course of his opinion he says:<sup>2</sup> “The ideas attached to the word “bankruptcies” in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject Congress has general jurisdiction; and the true inquiry is, to what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject,—distribution and discharge

<sup>1</sup> 1 Howard's R. 277, *in notis*.

<sup>2</sup> *Ibid.* 280.

are in the competence and discretion of Congress. With the policy of the law, letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily and be discharged without the consent of his creditors, the courts have no concern ; it belongs to the law-makers."

§ 401. The same point was presented and similarly decided in *Kunzler v. Kohaus*,<sup>1</sup> and *Sackett v. Andross*.<sup>2</sup> In these cases the Supreme Court of New York most elaborately considered the whole subject, and, notwithstanding a vigorous and somewhat peremptory dissent from Mr. Justice Bronson, held that "bankruptcies" apply to all persons unable to pay their debts; that the power of Congress is not restrained to any particular mode of discharge, whether voluntary or involuntary; and that the power exists to relieve the insolvent from debts antecedent as well as those subsequent to the statute. There is no direct restriction upon the power of Congress to pass laws impairing the obligation of contracts; and it was considered that the general grant of power to pass laws on the subject of bankruptcies, *ex vi termini*, includes prior as well as subsequent liabilities within its purview. The prohibition upon Congress from passing *ex post facto* laws, refers, as will be shown hereafter, to criminal offences only.<sup>3</sup>

§ 402. From the foregoing statement and analysis, it appears to be settled by judicial decision and legislative practice, that Congress has full authority to pass all laws relating to the distribution of the estates, and discharge of the liabilities, of failing debtors, whether we technically call such laws "bankrupt" or "insolvent"; that it may provide for the compulsory seizure and distribution of the assets at the instance of creditors, or the voluntary proceeding at the suit of the debtor; that the discharge may be made operative upon debts contracted prior as well as subsequent to the passage of the statute; that all matters of detail, such as whether the operation of the laws shall extend to all insolvents, or be confined to particular and designated classes, are mere questions

<sup>1</sup> 5 Hill's R. 317.

<sup>2</sup> Ibid. 327.

<sup>3</sup> See also *McCormick v. Pickering*, 4 Comstock's R. 276; *Thompson v. Alger*, 12 Metcalf's R. 428.

of policy, to be settled by Congress, and not questions of legislative jurisdiction, to be determined by courts. And I see no reason why Congress may not incorporate provisions looking to the punishment of fraudulent or extravagant debtors, by withholding the discharge for a time, or even by imprisoning the person in case where this severity is warranted by the circumstances.

§ 403. I cannot leave this subject without departing somewhat from my general plan, and adding a remark upon the policy of legislation under the grant of power so distinctly conferred, and the expediency of a national system of bankruptcy. I pass by the consideration of the relief it will afford to thousands of debtors hopelessly insolvent, and the fresh impetus it will give to business; because this topic belongs more especially to the political and social economist. There are other reasons which seem to me unanswerable, which apply to all times, and show that such a system should be a permanent part of the national legislation.

§ 404. The great trade and commerce of the country now passes beyond the limits of any one state; it is in a measure international; the creditor resides in one state, under one municipal law, the debtor in a different commonwealth which is governed by another local code. The diversities among the state laws which regulate the collection of debts and the settlement of the estates of insolvents, whether fraudulent or simply unfortunate, are almost as numerous as the states themselves. In some, preferential assignments are permitted, in others forbidden; in some, long stays upon execution are allowed; in some, an insolvent may be discharged from liability with the consent of a definite portion of the creditors; in others, without the consent of any; in others still, not without the consent of all. Added to this discrepancy, it is firmly settled by the Supreme Court of the United States, that an insolvent's discharge under a state law has no extra-territorial effect; that it is not in the least binding upon a creditor residing in another commonwealth who has not assented to it, although he may have been notified of the proceeding and made a party thereto.

§ 405. It certainly cannot be claimed that any benefit arises from this confusion and contradiction ; that the rights of either creditor or debtor are subserved thereby. Among absolutely independent and sovereign nations, there will, of course, be more or less diversity of municipal laws ; and persons engaged in foreign trade and commerce must necessarily be put to some inconvenience. But even among independent nations the tendency of the present age is to assimilate their systems of commercial and mercantile law. Among the several states of the Union, this diversity, and its accompanying inconvenience, need not exist. The Constitution confers upon Congress full power virtually to ordain one set of rules governing the relations of debtor and creditor throughout the whole extent of the country. The "uniformity" permitted by the organic law would render a discharge in one state binding in all others ; would establish the same acts and defaults of the debtor as occasions for bankrupt proceedings in every section ; would abolish the iniquitous privilege of making preferential assignments ; would enable the merchant in New York or Philadelphia who sells on credit to a trader in Illinois or Kentucky, to feel certain that when the time for payment should arrive, his debtor would not have failed and placed his assets completely beyond the reach of the deceived and exasperated creditor.

§ 406. If it should be objected that this legislation will oust the states of their jurisdiction, and render much of their law inoperative, I answer, in this very effect consists the great benefit of a national system of uniform laws on the subject of bankruptcies. It cannot be said that the measures of Congress will interfere with any rights and functions reserved to the states ; for the grant of power to establish bankrupt laws is as express and as comprehensive as that to regulate commerce. All the reasons which led the convention and the people to confer upon Congress a supreme authority over foreign and inter-state commerce, all the arguments which show that the regulations of that commerce should be uniform, and must, therefore, be within the authority of the national legislature, are as strong and convincing when applied

to the subject of bankruptcies. Indeed, both these grants of power form but parts of a general scheme by which uniformity in the laws which govern trade and finance throughout the country may be made possible ; neither was intended to stand by itself, but to be exercised in connection with all the others. This uniformity was to be attained by giving Congress the power to regulate commerce and establish laws respecting bankruptcies, which would become exclusive by its exercise ; by enabling it, and forbidding the states, to coin money ; by inhibiting the states from laying duties on imports, and requiring those laid by Congress to be the same in all parts of the Union ; and finally, by cutting off the power of the states to emit bills of credit, and to pass laws impairing the obligation of contracts. Congress has executed to their full extent some of these powers ; others it has exercised partially ; it is only by giving complete effect to all, that the original idea of the Constitution can be completely carried out.

§ 407. I am confident that a comprehensive and careful system of bankrupt laws will do more to put the trade of the country upon a firm basis, to abolish untoward and hazardous speculation, to remove the opportunities and inducements for fraud, than any other species of legislation directly affecting the business relations of the people. Make the statute prospective only, if necessary ; leave the thousands and tens of thousands of hopeless debtors still weighed down by the load of their insolvency, still subject to the demands of their creditors, if the principles or prejudices of society are too strongly opposed to a *tabula rasa* ; but not one argument worthy the name can be brought against the adoption of a thorough and stringent system that shall apply to all future liabilities and transactions.

## SECTION VI.

### THE POWER TO COIN MONEY.

§ 408. Section VIII. of Article I. proceeds as follows in the enumeration of specific powers : “ Congress shall have power . . . to coin money, regulate the value thereof,

and of foreign coin, and fix the standard of weights and measures." In this connection should be read a part of Section X. § 1, "No state shall coin money."

It is not necessary to dwell upon these grants and restrictions. The whole subject of coining money and regulating its value is placed in the exclusive control of Congress. The reason for this disposition of legislative functions is apparent. If the great elements of finance and trade were to be committed to the national authority, with the design that the regulations governing them should be uniform throughout the United States, it was absolutely necessary that the medium of exchange — the current coin — should be solely in the hands of the general government. If the several states might also issue coin, fix its standard of purity, and determine its value, all uniformity in exchanges, in prices, in the values of commodities, would at once be lost, and the business of the country would be thrown into hopeless derangement. We are familiar with the evil results flowing from the various state banking systems, from a local currency possessing different degrees of credit, even when there is a common standard existing in the national coin. But if this standard should also be lost, the evils springing from the conflicting local systems would be increased in a tenfold degree.

§ 409. I am not aware that any question requiring judicial decision, or even involving a conflict of interpretation, has ever arisen upon these grants of power; the language of the Constitution is too plain to admit of any doubt. The authority of Congress to issue treasury notes and make them legal tender, was not rested upon their exclusive right to coin money; if it had been, the foundation would have failed at the slightest pressure. No amount of reasoning could show that executing a promissory note, and ordering it to be taken in payment of public and private debts, is a species of coining money.

§ 410. While the power to coin money and regulate its value was thus given exclusively to Congress, the power to fix the standard of weights and measures was left in the hands of the states as well as of the general government. As long as this power remains dormant in the national legislature, the



local commonwealths may fully exercise it. Although the standard of weights and measures is connected with the general subject of the trade, business, and commerce of the country, and although uniformity in this standard throughout the Union is demanded by considerations of expediency, yet it is evident that such a uniformity is by no means as essential as a common standard of coined money. Without the latter, business would be interrupted, and in great measure destroyed; without the former, some inconveniences have been and are felt.

Thus far Congress has not assumed to fix, in any authoritative manner, the standard of weights and measures; the legislation of the states has not been interfered with. Even under the pressure brought to bear by the advocates of the decimal system, the utmost that has been done is the passage of a permissive statute. Should the national legislature, however, change its policy, and fix a standard for the whole country, all inconsistent state legislation would be a nullity.

## SECTION VII.

### THE POWER OVER THE POSTAL SERVICE.

§ 411. This power is granted in the following language: "Congress shall have power . . . . to establish post-offices and post-roads." No other constitutional grant seems to be clothed in words which so poorly express its object, or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post-offices and post-roads, is the form of the grant; to create and regulate the entire postal system of the country is the evident intent. Congress has uniformly recognized and acted upon this substantial meaning, rather than upon the mere form. Under this clause the whole postal department has been organized, with its vast retinue of officers, from its head, who is a cabinet member, down to the humblest postmaster. Among the measures adopted and universally acquiesced in as contained within the general language, may be mentioned, the selection of towns and other places in which

offices shall be situated and mails received and delivered ; the establishment of post-offices in those towns, including often the purchase, or erection, as well as the hiring, of edifices ; the designating of routes over which mails shall be carried ; the entering into contracts with parties for the transportation of the mails ; the purchase of bags for holding and carrying the mail matter ; the organizing a system for collecting and delivering letters in cities and large towns ; the fixing rates of postage ; the manufacture of stamps and stamped envelopes. These are some of the particular measures which have been considered by the legislature as fairly coming within a power to establish post-offices and post-roads. No doubt can reasonably exist as to the correctness of this legislative construction ; although the judiciary has not had an opportunity to pronounce upon the extent of the authority which may be exercised by Congress.

§ 412. In times preceding our own, this grant of power gave rise to a very acrimonious political discussion, which somewhat divided parties, but which never came before the courts for discussion. The dispute arose upon the meaning of the phrase "establish post-roads." One party contended that Congress could only point out existing highways as routes over which the mail should be carried ; the other claimed that the national legislature might not only take advantage of roads already in existence, but might construct others should it be deemed necessary. Congress did, however, in some instances, act under the more enlarged view ; and it would seem that many of the measures which have been adopted without a suggestion of their invalidity, involve a far more violent strain upon the language, than the single one of constructing or causing to be constructed, a post-road. In later times, the dispute lost much of its importance, and the contest finally ceased ; as private enterprise so completely occupied the field in building highways for travel and transport, that there was no occasion for the general government to act. But the question which for awhile was in abeyance, has arisen again in our own time, under new circumstances, and a new form. Congress has been called upon, and has responded to that call, to aid in the construction of great lines of railway, so great, demanding

so immense an outlay, as to be beyond the reach of private capital. Chief among these is the Pacific Railway. The power of the legislature to assist these enterprises has been partly rested upon the authority given them to establish post-roads. The whole subject is, as yet, confined to the legislative department; it has never passed into the domain of the courts. It is probable that, like so many other matters once doubtful and disputed, this class of measures will be quietly acquiesced in by the people, as it tends to promote the general welfare; and that the legislators and judges will be guided by the opinion of that great constituency which, after all, imposes its decisions upon each department of the government.

It never has been doubted that the power over the postal system is exclusively within the control of Congress.

## SECTION VIII.

### THE POWER TO CREATE AND BESTOW PATENT RIGHTS AND COPYRIGHTS.

§ 418. The next legislative power is given in these words: "Congress shall have power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is not necessary to dwell at any length upon this particular grant; and the purposes of the present work do not call for any explanation of the legislation thereunder. The power seems to have been tacitly assumed as exclusive. Certain it is that the full and minute patent and copyright laws of Congress have completely covered the ground and ousted the states of any jurisdiction which, perhaps, they otherwise might have had. The measures which may be adopted will involve means for ascertaining and declaring the priority of inventions and writings, and for enabling the inventors and authors thus ascertained to have the exclusive right to manufacture and vend their products at any place within the United States for a definite term of years.

§ 414. No state has attempted to pass any general statute providing for the same classes of persons ; and the task of issuing and enforcing patent rights for inventions and copyrights for writings, is entirely confined, under the laws of Congress, to the national executive and judiciary. There can be no doubt that a state may grant a special reward to particular inventors or authors, if it were deemed expedient, and thus promote the progress of science and the useful arts ; but such reward could not take the shape of a license for the exclusive use, manufacture, or sale of the article. Such an enactment would directly contravene the clause of the Constitution we are considering, and the legislation of Congress by virtue thereof. The means of promoting science and the useful arts which consists in bestowing such an exclusive right to use, manufacture, and vend the product, is given to Congress alone.

#### SECTION IX.

##### THE POWER TO DEFINE AND PUNISH CRIMES.

§ 415. I collect here all the express grants of power to legislate on the subject of crimes. In Article I. Section VIII. are found the following : “ Congress shall have power . . . . to provide for the punishment of counterfeiting the securities and current coin of the United States ; . . . . to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” No other provision is included within the general enumeration of legislative functions contained in the eighth section of the first article. But in Article III., which principally relates to the judiciary, there are clauses which contain express grants to, or limitations upon, the legislative department. These are as follows : “ Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason

shall work corruption of blood or forfeiture, except during the life of the person attainted.”<sup>1</sup> Also: “The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”<sup>2</sup>

In addition to these several direct clauses conferring authority over crimes, there are many other cases in which the power to legislate upon the subject is plainly implied in, is confessedly a consequence of, other general grants which primarily relate to a different subject-matter. The discussion, therefore, must be separated into two divisions: (1.) The express power to define and punish crimes; and (2) the implied power to define and punish crimes. These divisions will now be taken up in order.

#### First. *The Express Power to Define and Punish Crimes.*

§ 416. We must be struck at the outset by the very small number of these express grants, and by the restricted and precise terms in which the legislative powers contained therein are conferred. There are three separate provisions, each relating to a distinct group of crimes; the offences in each being indicated by a generic term, or by the highest in a grade of related delicts. These provisions cover (1) the counterfeiting of national securities and current coin; (2) piracies and felonies on the high seas, and offences against the law of nations; (3) treason against the United States.

#### I. *Counterfeiting the Securities and Current Coin of the United States.*

§ 417. The “securities” here mentioned might be so extended as to include all instruments by which the rights and interests of the general government are secured. But the context and the peculiar language used, show that the word is to

<sup>1</sup> Const. Art. III. Sec. III.

<sup>2</sup> *Ibid.* III. Sec. II. § 3.

be restricted to the evidences of indebtedness which the United States may have issued in pursuance of its power to borrow money. The power to coin money is protected in one portion of the clause, and the affiliated power of borrowing money would seem to be intended in the other. The bonds, treasury notes, certificates, and other written promises issued by the United States, would naturally circulate from hand to hand as representatives of value easily convertible, and to them the term "counterfeiting" may properly apply. The "current coin of the United States," plainly refers to that actually made and issued by the government, and does not include, as we shall see, foreign coin in circulation whose value Congress may have regulated. The authority to punish the counterfeiting of such foreign coin, and the forging of instruments which are not evidences of the public debt, must be referred to some other function of the legislature.

§ 418. The express grant in question, then, enables Congress to punish the crime of counterfeiting the evidences of the public debt which are included under the name "securities," and the national coin made and circulated by authority of the general government. "Counterfeiting" is a generic term, and, under the familiar principle of construction that a grant of the greater includes the less, it embraces not only the manufacture of forged coins and securities, but the uttering them when made, and the having them in possession with the intent to utter them. Congress may therefore pass laws determining each of these three grades of crime, — the manufacture, the putting into circulation, and the having in possession with the intent to put into circulation; and may affix such penalties and punishments to each offence as it deems expedient. The trial and conviction of offenders under these laws belong, as we shall see, to the national judiciary.

§ 419. As the coined metallic currency is national, completely and exclusively within the control of Congress; and as borrowing money is a national function of the highest consequence and import, to be guarded by all means within the power of the government, it was very proper, nay, absolutely necessary, that Congress should be able to pass laws providing

for the punishment of counterfeiters, and for the consequent prevention of acts which would render these attributes of coining and borrowing absolutely useless. If the power to punish the counterfeiters of these national representations of value had been left entirely to the states, the government would have been without protection; any antagonism which might arise between it and the local commonwealth would paralyze its energies and reduce its laws to an empty form.

§ 420. While it is so indispensable to the orderly working of the general government, that it should hold the authority to punish those criminals who would destroy its currency and its credit, is it equally necessary that the power should be exclusive? In other words, may the states also exercise this function, and make the offenders punishable under the local laws? We have seen that the cases of exclusive power held by the United States may be reduced to three: (1.) Where the grant is in exclusive terms; (2.) Where the states are expressly prohibited; and (3.) Where there is a direct repugnance and incompatibility in the exercise of it by the states.<sup>1</sup> The capacity to punish the offences in question does not fall under the first or second of these classes; does it under the third? In respect to some functions of the government it is impossible that two concurrent jurisdictions should act side by side upon the same subject-matter. Thus in regard to regulations of commerce, and bankrupt laws, if Congress has already legislated, any attempt of the states to pass laws would necessarily conflict with the system established by the general government. It is not so with respect to the function we are now examining. So long as Congress may apportion the punishments, and the national courts may try and condemn the criminals, there is no interference or repugnancy if the states also declare the act to be a crime, and supplement the punishment by a second penalty inflicted by their own tribunals. So long as the general government is left free to act, it is a matter which only concerns the state and the offender, whether he shall suffer a double penalty for the same criminal act.

§ 421. The question came directly before the Supreme

<sup>1</sup> See § 388.

Court of the United States in the case of *Fox v. The State of Ohio*.<sup>1</sup> The prisoner had been indicted, tried, and convicted in a state court under a statute of Ohio, for passing a counterfeit coin of the denomination of one dollar of the United States. He carried the case to the Supreme Court, and asked that the judgment should be reversed on the sole ground that the state statute was unconstitutional. The conviction was affirmed, the court substantially adopting the views stated in the preceding paragraph. Although the criminal act in this case consisted in the uttering a counterfeit coin, the principles involved in the decision apply to forged securities, and in fact to many other offences against the United States.

## II. *Piracies, Felonies committed on the High Seas, and Offences against the Law of Nations.*

§ 422. It must not be supposed that the authority of the Congress is exhausted when it has acted under the precise and restricted terms of this clause. We are not to consider, in the present connection, the extent of the power to legislate on the subject of crimes; but we are to interpret this particular grant and inquire what laws may be passed by virtue of its provisions alone.

The United States has exclusive control of the foreign relations of the country; it alone stands as an independent and sovereign equal in the family of nations; the states have not, in fact, any foreign relations. As this capacity and function thus inhere in the one body politic, its government is responsible to foreign countries for all breaches of international law done by its citizens. Where the responsibility rests the power should reside. Unless the government held the authority in its own hands to define offences against the law of nations, and to punish the offenders, it would be continually involved in controversies, and perhaps, wars, with other powers. As other states know it only in their intercourse, reparation, apology, security for the future would be demanded of it; and if the demand could not be answered, reprisals and war would be inevitable.

<sup>1</sup> 5 Howard's R. 410.



§ 423. For these reasons, to maintain a condition of peace, to do justice to other nations, to restrain the unlawful proceedings of its own citizens and inhabitants, the grant of power to define and punish offences against the law of nations was not only convenient but necessary. The grant is full and comprehensive, and any measures may be adopted under it which are demanded by the exigencies of our international obligations. An illustration of such measures is found in the "neutrality laws," so called, which forbid the fitting out and equipping armed vessels, or the enlisting of troops, for either of two belligerents, with whom the United States is at peace; and in the laws which prevent the organizing within the country of armed expeditions against friendly nations.

§ 424. Piracy is a word having a twofold legal aspect. It is an offence against the international law, and may be made also an offence against the municipal law. So far as piracy is an offence known to the law of nations, it is an universal principle of that law, that every state has jurisdiction over pirates, to arrest and punish them, no matter of what countries they are natives or citizens, and no matter where or against whom the offence was committed. The theoretical basis of this common jurisdiction is, that pirates have no nation; their crimes have denationalized them; they are said to be, not in a figure, but in reality, enemies of mankind, *hostes gentium*, at war with the whole human race. These principles apply, however, only to piracy according to the law of nations. It is important to inquire, therefore, What does the International Law declare to be piracy, and whom to be pirates?

§ 425. A late French writer has thus graphically described the crime and the criminals: <sup>1</sup> In general, pirates are those who rove the seas, under no national authority, but only under their own, to commit thereon acts of depredation, pillaging by main force, either in time of peace or of war, the ships of all nations, without making any other distinction than that which their own convenience or safety may suggest. The criminal acts committed by such desperadoes constitute the crime of piracy. Pirates, therefore, on the seas, resemble organized bands of

<sup>1</sup> Ortolan, *Diplomatie de la Mer*, Liv. II. Ch. XI.

highwaymen on the land ; only, pirates choosing for the theatre of their crimes a neutral sea, a place common to all mankind, and attacking, indiscriminately, all nations, their trade is even yet more dangerous to humanity.

The English and American courts have had frequent occasion to define this crime, and their definitions will be found more condensed and precise than the description just quoted from the French writer. Thus in England it has been declared that, "Piracy<sup>1</sup> is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, or whether or not it be accompanied by murder or personal injury. If a ship belonging to an independent nation, and not a professed buccanier, practices such conduct on the high seas, she is liable to the pains and penalties of piracy." Several cases of piracy came before the Supreme Court at an early day, the most important and leading of which was *The United States v. Smith*.<sup>2</sup> In their judgment the court observed: "There is scarcely a writer on the Law of Nations who does not allude to piracy as a crime of settled and determined nature ; and, whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea *animo furandi*, is piracy."

§ 426. The United States has, therefore, full power, either under the clause relating expressly to piracies, or under that referring to offences against the law of nations, to provide for punishing the crime as it is recognized by the universal brotherhood of civilized states. Indeed, the case of *United States v. Smith*,<sup>2</sup> decided that a statute of Congress providing for the punishment of any person who "shall commit the crime of piracy as defined by the law of nations," was a valid exercise of the general power conferred by the Constitution.

§ 427. But the authority of the legislature extends much farther. Many other acts done on the sea, which do not fall within the definition of piracy by the international law, may be made piracy by particular statutes, and thus brought under

<sup>1</sup> 1 *Phillimore on Intern. Law*, p. 379.      <sup>2</sup> 5 *Wheaton's R.* 153.

the operation of the municipal criminal code. It is for this reason that Congress is enabled not only to punish, but to *define piracies*. Thus it is settled by publicists and by courts that the slave trade is not piracy according to the law of nations. Ortolan is of this opinion.<sup>1</sup> Lord Stowell thus decided in a very carefully considered case.<sup>2</sup> The Supreme Court of the United States has announced the same doctrine.<sup>3</sup> But the United States may, by special statute, declare, as she, Great Britain, and many other countries have declared, the slave trade to be piracy, and may apportion such punishments as are thought expedient, to the persons engaged in the nefarious traffic. Again; privateering has long been recognized as lawful by the international law; but Congress may certainly enact laws by which those engaged in this species of hostilities shall, under the circumstances described, become subject to the pains and penalties of piracy.

§ 428. The remaining class of offences embraced within this particular grant of power, are felonies committed on the high seas. As Congress may exercise an exclusive control over the foreign commerce of the country, it seems not only proper but necessary that the general government should have jurisdiction over crimes committed on the highway of that commerce. The power of the legislature over this subject is not, however, confined to the cases mentioned in the clause under consideration. The grant contained in Article III. Section II. which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, greatly enlarges the functions of Congress, and enables it to define and punish crimes committed within the admiralty jurisdiction, although not upon the high seas. There has been much dispute as to the extent of the admiralty jurisdiction recognized by the Constitution. Some have asserted that it is confined to waters in which the tide ebbs and flows without the territorial limits of a county; others have claimed that it is co-extensive with the ebb and flow of the tide although within those limits. This question

<sup>1</sup> *Diplomatie de la Mer*, Liv. 1, p. 213.

<sup>2</sup> *The Louis*, 2 Dodson, Adm. R. 210.

<sup>3</sup> *The Antelope*, 10 Wheaton's R. 66.

will be more particularly examined hereafter; it is enough now to say, that the Supreme Court has finally and authoritatively settled the doctrine that the admiralty jurisdiction extends not only to all tide waters, but also to the great inland lakes and navigable rivers which are tideless.<sup>1</sup>

§ 429. The criminal legislation of Congress in respect to offences committed upon the sea, must, therefore, be referred to two grants of power, — that to define and punish felonies committed on the high seas; and that conferring admiralty jurisdiction. The cases which have been decided have rather turned upon the language of statutes, than upon the meaning and force of the constitutional provisions. It may be considered as settled, however, that the “high seas” referred to in the eighth section of the first article, include only those tide waters without the territorial limits of the country, in contradistinction to those portions of the sea *infra fauces terræ*, such as tidal rivers, bays, harbors, and the like.

In 1790 Congress passed a crimes act, which provided, among other things, for the punishment of any person who shall commit murder or robbery, “upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular state;” and also of any person who shall “commit manslaughter upon the high seas.” In the *United States v. Wiltberger*,<sup>2</sup> a case arising under this statute came before the Supreme Court. The defendant was indicted for a manslaughter committed by him on board an American ship while lying in the river Tigris, in China, below the low water mark, about thirty-five miles from the mouth, but where the tide ebbed and flowed. The court held that the offence was not within the language of the statute, because the place of its commission was not upon the high seas, and the law made no provision for a manslaughter done in a river, haven, basin, or bay. Mr. Justice Story gave the same definition of the term in *The United States v. Grush*,<sup>3</sup> and in the *United States v. Ross*;<sup>4</sup> although in *DeLovio v. Boit*,<sup>5</sup> while speaking of the extent of

<sup>1</sup> The *Hine*, 4 Wallace's R. 555.

<sup>2</sup> 5 Wheaton's R. 76.

<sup>3</sup> 5 Mason's R. 290.

<sup>4</sup> 1 Gallison's R. 624.

<sup>5</sup> 2 Gallison's R. 398, 427, 428. See also, *United States v. Bevans*, 3

admiralty jurisdiction, he included a roadstead or bay within the "high seas."

§ 430. The conclusion would seem to be, that, under the authority conferred in Article I. Section VIII., Congress may pass statutes which define, and provide for the punishment of, felonies committed upon the tidal waters outside the territorial limits of any country; and that, under the judicial power over admiralty matters, in connection with the last paragraph of the eighth section of Article I., Congress may pass laws which define, and provide for the punishment of, offences done on tidal waters even within the territorial limits of a country, so far as the criminal jurisdiction of the admiralty extends.

### III. *Treason against the United States.*

§ 431. It was most proper that Congress should be clothed with authority to declare the punishment of treason; indeed, in the absence of any express provision on the subject, there could be no doubt of the power of the government to define treason and punish traitors. As the people of the United States is one body politic possessing inherent sovereignty, and as the Constitution and the government established thereby, is the highest expression of that sovereignty, it could not, for a moment, be admitted, that the very crime of all crimes, the crime against the supremacy and life of the nation, should, under any circumstances, go unpunished. The provision in the Constitution is, therefore, in a certain sense, superfluous; it is rather a limitation upon, than a grant of, governmental power.

§ 432. I do not propose to go into any examination of the law of treason; such an attempt would be entirely foreign to the objects of this work. The constitutional provision defining the crime was inserted as a safeguard of the rights and liberties of the citizen. It places a limit beyond which neither the legislature nor the courts can pass. It was borrowed substantially from an ancient statute enacted in the reign of Edward  
Wheaton's R. 336; United States v. Furlong, 5 Wheaton's R. 134; United States v. Holmes, 5 Wheaton's R. 412.

III., and was intended to destroy forever all opportunity for legislative or judicial extension of the crime so as to cover what are known as constructive treasons. By incorporating the definition in the organic law, the future as well as the present is secured, and the liberties of the people are preserved from one of the most terrible instruments of oppression ever wielded by rulers maddened through fear, and drunk with the excess of power.

Treason presupposes citizens and citizenship, and its essence consists in the violation of allegiance. As the allegiance of American citizens is due, not to the rulers, not to the government, but to the United States, to the one body politic, which is the nation, treason is described as a crime against the United States, and as consisting of acts done against their integrity and existence.

§ 433. The Constitution mentions two classes of acts, and two only, which may constitute the crime: (1.) Levying war against the United States; and, (2.) Adhering to the enemies of the United States, giving them aid and comfort. As the offence is so aggravated, and its consequences so terrible, more than ordinary certainty is required in the proof necessary to establish guilt; two witnesses must testify to the same overt act, or the accused must confess in open court. These provisions taken together require an overt, or open, act of levying war, or an open act of adherence to the nation's enemies, giving them aid and comfort; without one or the other there can be no treason. No mere words can, therefore, amount to treason; no mere conspiring, confederating, planning, can make men traitors; for none of these acts are overt. The English statute adds a third case, — compassing the death of the king; and this element of the crime may consist in simple conspiring and confederating. But it is not treasonable to compass the death of the President, or even to accomplish the design and take his life.

§ 434. The common law punishment for treason was death in a most terrible form; the offender was to be drawn to the gallows; hung by the neck, and cut down alive; his bowels were to be taken out while he was alive, and burned; he was

then to be beheaded and his body quartered. It was well that Congress should have express power to fix the penalty, and to abandon this horrible relic of a barbarous age. The power has been exercised by declaring death by hanging to be the punishment. The common law also annexed other penalties to the crime of treason, corruption of blood, and forfeiture of the estate of the attainted offender. Corruption of blood was the destruction of all inheritable qualities in the person; so that he could neither succeed as heir to any lands which might otherwise have come to him by descent, nor could other persons inherit from or through him. As the source, as the channel, and as the end of descent, his capacity was utterly gone. Upon conviction he also forfeited his lands from the time when the treasonable act was committed, and his goods and chattels from the time of the conviction. These rules of the law, visiting severe penalties upon the innocent, were supposed to have a strong moral effect in deterring persons from crimes which would thus bring ruin upon their families.

§ 435. The Constitution has abandoned these ideas and the rules which they suggested. No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. The "attainder" here spoken of is a judicial conviction of the crime. Bills of attainder were known to the English law, and were legislative convictions; they are forbidden by express provisions of the Constitution, and the only attainder possible in the United States is a judgment of a competent court ascertaining and declaring the guilt of an accused person. Corruption of blood is entirely abolished; forfeiture of estate is permitted to a very limited extent.

How far Congress may provide for the confiscation of private property belonging to rebellious citizens with whom a civil war is waged, will be considered in subsequent sections which treat of the military functions of the government.

§ 436. While treason is expressly defined, and direct power is conferred upon the legislature to declare its punishment, it must be understood that the mention of the highest crime includes also those of inferior grades, but of a nature kindred to treason. If Congress may legislate concerning this greatest of all

offences, it certainly may define and punish those which resemble it in essence, but do not reach its height of enormity. Such are seditions, conspiracies to overthrow the government, and the like, in which there is no overt act, and which, therefore, do not amount to levying war, or adhering to the nation's enemies. At a very early day, (1790,) Congress assumed to exercise such a power, by defining misprision of treason to consist in the having knowledge of the commission of treasons, and the concealing the same, and by affixing as a punishment, imprisonment and a fine.

Second. *The Implied Powers to define and punish Crimes.*

§ 437. In addition to the express powers bestowed upon Congress, to define and punish crimes, which we have seen, may be grouped into three classes, there are a very large number of implied powers. These all exist from the very nature and necessity of the case. They are results and applications of the general principle which was set forth and illustrated in Part III. Chapter III. Section II. They are measures and means which conduce, which are, in fact, often absolutely necessary, to the effective exercise of the legislative function. A sanction is an essential element in every law; without it all the imperative qualities of a law would be lost; the statute would cease to be a command and become a mere request. Wherever Congress may adopt any particular measure, may require anything to be done, or anything to be foreborne, in carrying out the specific grants of the Constitution, it may declare acts of disobedience, or acts which tend to interrupt the accomplishment of the proposed design, to be crimes, and may affix such punishments as it deems proper. This proposition seems to be self-evident. Without the capacity most of the national legislation would be a nullity. Congress has, therefore, from the very commencement of the present government, assumed and exercised this power in instances too many to be enumerated.

§ 438. If it should be said that the penal legislation necessary to enforce the laws of the United States might be left to



the states, the answer is easy and conclusive. Every government which is supreme, must have the capacity to make its own commands obeyed; just so far as it must look to other bodies, to other governments for help, it is subordinate. But the United States is, within its sphere, absolutely supreme; and it would be no more proper for it to appeal to the several states for penal legislation in its behalf, than for it to invoke the assistance of Great Britain or France. But in addition, the states could not be compelled to legislate; their action would be voluntary; and the national government would, therefore, be entirely at their mercy. The considerations I have stated are so plainly correct, that none but a few impracticable theorists, who would exalt the states into a condition of practical supremacy, have ever denied the authority of Congress to define and punish crimes not expressly provided for by the Constitution.

§ 439. These views have been sustained by a solemn judgment of the Supreme Court. Congress had passed a statute making the bringing of counterfeit foreign coins within the country, with the intent to utter the same, and the act of uttering such coins, crimes to be punished by imprisonment. It will be noticed that the clause of Article I. Section VIII. giving power to provide for the punishment of counterfeiting the current coin of the United States, does not in terms cover this case. In *The United States v. Marigold*,<sup>1</sup> the defendant had been indicted under the law, tried, and convicted; and the only question before the court was as to the validity of the statute. The decision sustained the validity; and was rested upon the ground that such a law was one of the necessary and proper means for carrying out the power to coin money, and regulate the value of foreign coin. The principle involved in the case evidently applies with equal force to all the penal legislation of Congress in aid of its other general powers.

§ 440. The views stated in §§ 437 and 438, are also sustained by the uninterrupted practice of Congress. The statute book is crowded with enactments defining and providing for the punishment of crimes, which are not alluded to in the

<sup>1</sup> 9 Howard's R. 560.

letter of the organic law. In the first place, may be mentioned the provisions which secure the faithful performance of official duties, which impose penalties, greater or less in extent, upon acts of misconduct in office, embezzlements, and frauds of officers, and the like. In every department of the civil service, the public officers are restrained by criminal legislation. The power to regulate commerce, and the power to lay and collect taxes require penalties of fine and imprisonment at every step. If bonds are demanded from an importer, the forging such instruments must be declared a crime and properly punished. If oaths are required in any proceeding, false swearing must be prevented by a suitable sanction. The internal revenue law now in operation describes more than twenty-five different acts which are made criminal, and to which a punishment by fine or imprisonment is affixed. The establishment of post-offices and post-roads involves legislation respecting the crimes of robbing or obstructing the mail. The system of national banks is guarded by numerous statutory provisions which tend to preserve the integrity of the currency by punishing counterfeiters, and the good faith of bank officers, by punishing their frauds, embezzlements, and misapplications of money. Examples and illustrations might be multiplied; but these are enough to show that the power of Congress is amply sufficient to meet any emergency; that it may wield all the sanctions required to procure the observance of its laws.

## SECTION X.

### THE MILITARY AND WAR POWERS.

§ 441. We now arrive at that most important group of powers which, collectively, may be termed the military and war powers. They are conferred in the following clauses: "Congress shall have power . . . to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to

make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

In this connection should be read the prohibition in Section X. of the same Article, as follows: "No state shall, without the consent of Congress, . . . keep troops or ships of war in time of peace, . . . or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

§ 442. It will be seen that these war powers are, in fact, divided into three general classes or groups: (1.) Those which relate to the inception and conduct of war; (2.) Those which relate to the raising, maintaining, equipping, and governing the regular land and naval forces, the army and navy proper; (3.) Those which relate to the employment of the militia in the service of the general government.

These classes will be considered separately and in their order.

### First. *The Powers which relate to the Inception and Conduct of War.*

#### I. *The Power to Declare War.*

§ 443. I shall enter into no explanation of the nature, kinds, and causes of war, or of the rules which govern its conduct. These are subjects which belong rather to the international law, and are fully treated in works upon that department of jurisprudence. It is sufficient to know that the people considered the act and state of war a matter of such transcendent importance and magnitude, involving such untold personal and material interests, hazarding the prosperity, and perhaps

the very existence of the body politic, that they committed its formal inception to that department of the government which more immediately represents them, — the Congress. In this they differed from England, and most, if not all, other monarchical nations, constitutional or despotic, in which the power to declare war is held by the Crown; the check upon its exercise in England being the authority of Parliament alone to raise and maintain armies and navies,—the control of the purse.

§ 444. The commencement of a state of hostilities is a political act, within the province of, and to be judged by, the political departments. We shall, therefore, find few judicial decisions throwing light upon the clause under consideration. One, however, of the highest importance, and of far-reaching effect, will be cited in this connection.

Congress has power to declare war: Does this import that there can be no state of proper war until Congress has, by a legislative act, asserted it to exist? If a foreign nation should make war against us during a recess of Congress, are the hands of the government tied up until that body can be assembled? Were this so we should be at the mercy of every powerful and ambitious nation. It has not been, nor can it be, questioned, that Congress may declare a state of war to exist, which had been commenced by the enemy before such declaration, and that all the rights, national and international, of belligerents will thence ensue. Such was the method of procedure in the war with Mexico.

§ 445. But it has been claimed that a declaration of this latter sort, at least, is necessary to clothe the government with belligerent rights; and that prior thereto the only power of the executive is a defensive one, to act under an old statute of Congress permitting the President to call out the militia in order to repel invasions or suppress insurrections.

Before referring to any authorities, it is proper to state another most important constitutional question which has been raised by the events of the past few years, namely, Whether the national government can wage war against any state organizations, or against any combinations of citizens; which includes the question whether, under the Constitution, a re-

bellion or insurrection against the national authority can take on the character of proper war, so as to confer the rights of belligerents upon the government, as against the rebels, and against neutrals, and subject the rebels to the incapacities and obligations of enemies.

§ 446. I do not purpose to enter into any discussion of the question whether states may secede. This subject was sufficiently examined in Part I. I will content myself with stating what appears to me a dilemma from which there is no escape. If states have no constitutional right to withdraw from the Union, then any armed opposition to the government, whether carried on by irresponsible combinations of men, or by the aid and support of state governments, is an insurrection or rebellion, which the Constitution in terms allows to be suppressed by military force. If states may, under the Constitution, secede, they become, by the very act of secession, foreign nations, against whom Congress may declare and carry on war; for the organic law nowhere prescribes or limits the causes for which hostilities may be waged against a foreign country. The causes of war it leaves to the discretion and judgment of the legislature; and there probably never was a war concerning which it might not be urged that the causes, on the one side or the other, were insignificant or unjust. For this reason it would have been utterly futile to have restricted Congress to the inception and waging of just wars. Herein seems to be a complete answer to the objections raised against the authority of the United States to "coerce sovereign states."

§ 447. Passing from this inquiry, which is political and international, rather than constitutional and municipal, the other points suggested above have been definitively settled by the Supreme Court of the United States in the Prize Cases<sup>1</sup> decided in 1863, growing out of the late hostilities. The cases arose from the capture of several vessels attempting to violate the blockade of Southern ports. Some of these vessels were neutral, and the sole question as to them was whether the blockade was lawful; others were owned by persons residing within the

<sup>1</sup> 2 Black's R. 635.

Southern states, and the question as to them was, whether the owners were, by the mere fact of such residence, public enemies, so that their property would be confiscable without any examination into their sentiments for or against the government. Both of these questions depended for their solution upon a more general one, namely, Whether at the time of the capture a state of proper war existed.

§ 448. It will be remembered that upon the first open act of hostilities, the taking of Fort Sumter, the President summoned 75,000 men to suppress the insurrection or rebellion, (April 15th, 1861;) that he proclaimed a blockade of the Southern ports, and stationed men-of-war to make such blockade effective, (April 19th and 27th, 1861.) Congress was also called to meet at a future day appointed. They did so meet, (July 4th, 1861;) and immediately passed statutes recognizing the state of hostilities, and maintaining the authority of the government. In the interval between the establishment of the blockade and the passage of these laws, the vessels in question were captured; they were libelled in the District Courts and condemned as good prize, and from the decrees of condemnation appeals were taken to the Supreme Court.

§ 449. The cases fairly presented three general questions of public law; and upon the answers would depend the practical inquiry as to the property in the captured vessels.

First. Can the government coerce the states assuming to act in a sovereign capacity, and to repudiate the authority of the nation? This was not openly and directly argued by the counsel; it was rather hinted that the power does not exist. Nor did the court in terms discuss it; the affirmative was, however, necessarily assumed in the decision which was reached.

Second. Can the forcible means employed by the government to suppress an insurrection or rebellion of its citizens ever be called a proper war, so as to confer belligerent rights upon the nation, and belligerent disabilities and incapacities upon the rebels? and

Third. Assuming the affirmative of the last, can these forcible means be called a proper war, with all the consequences of

such a war, before Congress has, by a legislative act, declared such state of war to exist?

§ 450. The negative of both the latter questions was urged and argued with great fulness by the counsel who opposed the legality of the captures, although the force of the argument was expended upon the last. It was claimed that, until Congress met and declared war to exist, the only power under which the President could act was that conferred upon him by a statute passed in 1795, authorizing him to call out the militia to repress insurrections and rebellions; that *as Executive* he had no authority in the matter, his only capacity being to execute the law referred to; that this statute gave no power to use other belligerent measures than those indicated by its terms, — the militia force; that the blockade was therefore a nullity, so far as all captures made before the legislative ratification were concerned.

§ 451. The court was compelled to meet and decide all these questions; and decide them it did, in the affirmative. The first, as I have already said, was assumed; the others, (§ 448,) were definitively passed upon. The opinion of the court was delivered by Mr. Justice Grier, and I quote from it a few pertinent passages. He says: <sup>1</sup> “Let us inquire, whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing a hostile force. War has been well defined to be ‘that state in which a nation prosecutes its rights by force.’ The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion; but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents, the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile

<sup>1</sup> 2 Black's R. 666.

manner a certain portion of territory ; have declared their independence ; have cast off their allegiance ; have organized armies ; have commenced hostilities against the former sovereign, the world acknowledges them as belligerents, and the contest as *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign state ; while the sovereign party treats them as insurgents and rebels, who owe allegiance, and who should be punished with death for their treason." "As<sup>1</sup> a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history, which the court is bound to notice and to know."

§ 452. Again :<sup>2</sup> "If a war be made by invasion of a foreign nation, the President is not only authorized, but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be unilateral. Lord Stowell observes :<sup>3</sup> 'It is not the less a war *on that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge, to be accepted or refused at the pleasure of the other.'"  
 "It<sup>4</sup> is not the less a civil war with belligerent parties in hostile array, because it may be called an insurrection by one side, and the insurgents considered as rebels and traitors. It is not necessary that the independence of the revolted province or state be acknowledged, in order to constitute it a party belligerent in a war, according to the law of nations."

§ 453. In respect to the powers of the executive, he proceeds :<sup>5</sup> "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name ; and no name given to it by him or them, could change the fact." "The<sup>6</sup> law of nations contains no such

<sup>1</sup> 2 Black's R. 667.

<sup>3</sup> 1 Dodson's Adm. R. 247.

<sup>5</sup> Ibid. 669.

<sup>2</sup> Ibid. 668.

<sup>4</sup> 2 Black's R. 669.

<sup>6</sup> Ibid. 670.



anomalous doctrine as that which this court are now, for the first time, desired to pronounce, to wit, That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an insurrection. Whether the President, in fulfilling his duties in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."

## II. *The Power to grant Letters of Marque and Reprisal.*

§ 454. I need not stop to comment upon this clause. It includes the power to provide for the commission of privateers to cruise during a state of perfect war; and of private armed vessels to make reprisals upon the commerce of an unfriendly nation, during a condition of imperfect war. The whole subject of privateering and reprisals belongs to the international law.

## III. *The Power to make Rules concerning Captures on Land and Water.*

§ 455. The "captures" here spoken of, are the things taken by the armed forces of the government, and not the very act itself of taking. The word is used in both senses. We speak of the capture of a town, district of territory, ship, fort, army; and thereby imply the fact of their seizure. The clause cannot admit of this construction; otherwise a very large part of the

disposition and management of the land and naval forces would be in the hands of Congress; and the "Commander-in-Chief" would be an empty title, with little or no power except to enforce the mandates of the legislature. The policy of the Constitution is very different. It was felt that active hostilities, under the control of a large deliberative body, would be feebly carried on, with uniform disastrous results. All history teaches this truth, and shows that the army and navy must be wielded by a single will, must be instruments in one hand. The Constitution has therefore clothed the legislature with power to originate a war; to furnish the requisite supplies of money and materials; to authorize the raising of men; and to dispose of the results. All this is a complete check upon the Executive; for Congress may, by refusing to grant supplies or raise forces, drive the President to conclude a peace, or inaugurate a different policy in the conduct of actual hostilities. But all direct management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens. The only possible authority for Congress to pass measures in respect to the actual conduct of hostilities, is found in the last paragraph of Section VIII. Article I., which gives them power "to make all laws which shall be necessary and proper for carrying into execution . . . all powers vested by this Constitution in the government of the United States, or in any department or officer thereof." But these measures must be supplementary to, and in aid of, the separate and independent functions of the President as commander-in-chief; they cannot interfere with, much less limit, his discretion in the exercise of those functions.

§ 456. Congress may, therefore, make rules concerning the disposition of all things taken, seized, captured by the national forces of every description. And this includes a vast array, both in number and magnitude, of special objects to which the legislative power may be directed. Under the clause in question, Congress can pass statutes providing for the disposition

of enemies' or neutral ships and goods taken at sea, while violating belligerent rights, — the entire code of prize regulations; for the disposition of public and private property of the enemy taken on land; for the disposition of the persons of enemies taken prisoners; and, doubtless, for the disposition of enemies' territory conquered and held by a victorious army, except so far as this power may be controlled by the higher function of treaty-making, held by the President and Senate.

§ 457. The same capacity exists in a civil war, while the hostilities are actually raging; although the Constitution forbids private property of citizens to be taken for public use without just compensation; and provides that the citizen shall not be deprived of life, liberty, or property without due process of law; and thus prohibits legislative confiscations, and all other summary proceedings of a like character. Indeed, there is something exquisitely absurd in the supposition that a civil, any more than a public, war can be waged under the protection of the Bill of Rights. This point was definitively settled in the Prize Cases,<sup>1</sup> just cited, with reference to the private property of a resident within the insurgent territory, taken at sea; and I see no possible difference between that case and the case of such property taken on land during the prosecution of the war.

§ 458. Mr. Justice Grier, in answering the argument which opposed the treatment of the Southern citizen's vessel and goods as enemies' property, and which urged that the ordinances of secession being null and void, the Southern people were still citizens of the United States, and as such entitled to the immunities and privileges established by the Bill of Rights, says rather pithily: <sup>2</sup> "This argument rests on the assumption of two propositions, each of which is without foundation. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated

<sup>1</sup> 2 Black's R. 635.

<sup>2</sup> Ibid. 672.

by the municipal law ; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture by the laws of war, because it is *unconstitutional!!!*"<sup>1</sup> He then proceeds to rebut these assumptions and to repel the argument.

In fact, those who maintain the views opposed to this case, are inevitably driven to the position, that under the Constitution of the United States, a civil war, however great, is no war, but only an aggravated riot ; and the armies and navies used in suppressing the disturbance, are only a somewhat exceptional *posse comitatus*, called out to aid the sheriff in his civil duty of dispersing the unlawful assemblages, and arresting the offenders.

§ 459. It is well known that Congress, during the late civil war, acted under the construction of their powers which I have stated and advocated ; and passed many statutes for the disposition of property seized on land by the armies, in particular of cotton and slaves, selling the one and liberating the other. They also provided for the confiscation of enemies' property by civil proceedings.

How far measures of confiscation, after the hostilities have ended, are lawful, is an entirely different question ; its solution depends upon considerations which have no connection with the military powers of Congress.

Second. *The Powers which relate to the Raising, Maintaining, Equipping, and Governing the regular Land and Naval Forces, the Army and Navy proper.*

I. *The Power to Raise and Support the Forces.*

§ 460. Congress has power "to raise and support armies," "to provide and maintain a navy," but no appropriation for the army shall be for a longer term than two years. It will be noticed that the latter restriction does not apply to the navy. The army here spoken of is the regular standing army, in contradistinction to the militia, and to volunteer organizations throughout the country.

<sup>1</sup> The marks of emphasis are not mine.

These provisions in the Constitution were made the ground of a most violent attack upon that instrument when it was before the people for adoption. It was urged with great vehemence that a standing army would become the instrument, in the hands of the President, of overthrowing the liberties of the people ; that its numbers, at all events, should be limited ; that a navy was useless, a mere means of expense and of irritation. In fact, the navy remained under a cloud until the war of 1812 brought it into favor. The futility of these objections has been so conclusively shown by the past history of our country, that I need not occupy time and space with stating the arguments by which they were met. These arguments are all summed up in the fact that the army is entirely under the control of the direct representatives of the people ; and to say that they cannot be trusted, is to say that the people cannot be trusted, and that all republican government is a failure.

§ 461. Those who are familiar with the outlines of English history, know that one of the chief matters for a long time in dispute between the Crown and the Commons, was as to where the jurisdiction to raise and maintain armies lay. The Commons claimed that it rested exclusively with Parliament ; the Crown asserted that its own prerogative enabled it to raise forces and collect money for their support by divers imposts and duties. The controversy was finally decided in favor of the Commons. It needs no argument, at this day, to show that in any nation assuming to be republican, or even constitutional, there can be no liberty, no security, no certainty that the existing constitution of things, the settled public order and tranquillity, will remain, unless the power to raise and support the armed forces of the state is exclusively confided to the popular branch of the government. This has passed into an axiom of the public law. The power of the purse is yet stronger than the power of the sword. Armies and armed forces are, of all things, the most expensive ; and if the supplies be withheld, the array will collapse. Thus the Constitution has given the people, through their direct representatives, a complete check upon any illegal and revolutionary designs

of the Executive ; and even upon his ambitious or ill-considered methods of carrying on a war that had been authorized by Congress.

§ 462. But the Constitution goes farther even than this, farther than the organic law of Great Britain. Parliament has indeed adopted a practice, or policy, of making an appropriation for the army, and authorizing its maintenance for only one year ; renewing annually the statute by virtue of which the army exists. But this is only a practice, which may be abandoned at any time. Parliament may, if it choose, pass a law establishing the army for ten, or any other number of years, and making an appropriation for its support during all that time. This Congress cannot do. The utmost limit to which they can extend their action in the way of support and maintenance, is two years. If they should withhold the supply, every officer and every private must go without his pay, clothing, and rations. The probable reason for adopting this limit was, that two years is made the time for the existence of each Congress ; that every two years the people are called upon to elect new representatives, when the acts of their late delegates will be passed in review. It was considered that, by making the term of office two years in length, the people had delegated their entire discretion for such period to their representatives, retaining the power to mark their disapproval of any measure by rejecting their former agents, and by appointing others who will carry out their wishes.

§ 463. What laws Congress may pass by virtue of this power, has not been illustrated to any extent by judicial decision ; nor is there room for much doubt or question. "Raising" armies, includes the determination of the number of men who shall be enlisted ; the different arms of the service into which they shall be separated ; the number and arrangement of companies, regiments, brigades, and corps ; the number and rank of officers ; the time of service of men and officers, and other like matters. "Providing" a navy, includes the determination of the same class of subjects relating to seamen and officers, and also the number, size, character, and cost of ships and other vessels of war ; the number, size, situation,

and cost of navy and dock yards, and other places of construction.

“Supporting” an army, includes not only the provisions for the food, clothing, cost of transportation of men and officers, but also provision for their warlike equipment, arms, ammunition, medical attendance; also provision for their and the country’s defence by the construction and maintenance of barracks, arsenals, depots, forts and all other fortifications, both temporary and permanent; in short, any thing that can make an army effective for offensive or defensive purposes. The same is true in reference to “maintaining” a navy.

§ 464. In accomplishing these direct objects, Congress may adopt all measures necessary and proper for effecting the required purpose. They may either purchase or manufacture arms, ammunition, etc.; they have done both; they may educate officers in military science, as is done in the national military school at West Point, and the naval school at Annapolis; they have organized the war and navy departments, with their many subordinate bureaus; they have provided for the payment of bounties in money and land, and pensions to soldiers and their families. It is claimed by many statesmen, that they may construct, or aid in the construction of great highways, or railways, as means for the ready transport of troops. The action of Congress in aid of the Pacific Railway, is partly supported by this view of their constitutional power.

§ 465. In what manner Congress shall proceed to raise men for the army and navy, may admit of some question. The common practice, under ordinary circumstances is, to enlist them for a definite period of years, as they shall voluntarily apply. This, doubtless, suffices as the general procedure. But emergencies may arise, and have arisen, when this slow process would be utterly inadequate to the exigencies of the times. Then the government may call for volunteers; and as an incentive, offer bounties, and permit those volunteering to organize themselves into regiments, under their own officers partly or wholly. This plan was adopted in the Mexican War. The volunteers then called out, were not a part of the militia, for they were required to depart from the territory of the

United States, which the militia, as we shall see, cannot be compelled to do.

§ 466. During the late war, the general government seems to have acted under both their powers of raising armies, and calling out the militia combined, as they, beyond a question, might do. The first call of 75,000 men was in terms made under an old statute of Congress permitting the President to call forth the militia in order to suppress an insurrection. The subsequent calls for volunteers seem to have been made under the power to raise armies; for the men were enlisted for a definite period, three years or until the end of the war; they were often added to existing regiments; the general officers were appointed by the Executive. Still the idea of militia was not entirely abandoned; regiments were organized by states, quotas were demanded from states, state governors appointed the regimental officers. There can be no doubt, however, that these forces were organized under the general power to raise armies; that they formed a part of the army of the United States, and not of the militia in active service; and that this procedure on the part of the government was entirely constitutional. None but mere verbal theorists and critics objected to it, although such objections were raised.

Whether Congress may resort to conscription as a means of filling their armies, cannot be fully considered until the power to call forth the militia is examined. The discussion of the question will therefore be postponed till the close of this section.

## II. *The Power to Govern the Forces.*

§ 467. Congress may make rules for the government and regulation of the land and naval forces. It is to be noticed that this power is entirely independent of the ordinary judicial department of the general government. It is applicable only to a special class of men, — those in the land or naval forces. The fifth Amendment of the Constitution shows conclusively that the rules to be made under this clause, were to be outside of ordinary civil judicial proceedings; for it excepts those persons in the land or naval forces, and those in the militia when



in actual service in time of war or public danger, from the safeguard of an indictment.

§ 468. The language of this clause should be carefully observed. Congress may make *rules*, the object of which shall be regulation and government. It cannot utter exceptional, or transitory mandates which affect the management and disposition of the army or the navy. This particular grant of power confers no authority upon the legislature to usurp the functions of the commander-in-chief. The rules framed by Congress for the regulation and government of the land and naval forces, form, together, the military law of the land; they are a part of the general statutory legislation of Congress applicable to a special and designated class of persons, soldiers and sailors; they stand on exactly the same footing as any other statutes; are just as binding; and the decisions of courts thereunder are just as effective as any other laws, or any other judgments.

§ 469. This military law, or in other words, this code of positive, enacted, statutory rules for the government of the land and naval forces, is something very different from martial law, which, if it exists at all, is unwritten, a part and parcel of the means and methods by which the Commander-in-chief may wage effective war, something above and beyond the jurisdiction of Congress; for that body has no direct authority over the actual conduct of hostilities, when war has been initiated. Whether there be any martial law in this, its proper sense, will be considered in a subsequent chapter.

§ 470. Under this grant of power, Congress may establish a military discipline, — may adopt a system of tactics; define military offences, provide for their punishment; organize courts martial, and prescribe their jurisdiction, practice, and the mode of executing their sentences. This has been done, not only in our own country, but in every other land where there is a standing army. It should be carefully borne in mind, however, that the only legitimate subjects of this military code of regulations are the land and naval forces, — the officers and men of the army, the navy, and the militia when in active service of the United States.

§ 471. During a late session of Congress, a statute was enacted which prescribes in substance that all orders of the President to the army, or any portion thereof, shall be directed to, and shall issue through, the general; and that the general shall have his permanent headquarters at Washington. The President objected to these provisions on the ground that they interfered with his independent functions as Commander-in-chief. It may not be improper to express the opinion, that the first of these statutory requirements is clearly not obnoxious to the criticism made upon it. It is simply a rule for the regulation of the army; a rule similar in its nature to hundreds of others which are found in the code of tactics adopted by authority of Congress. It does not limit in the least the power or discretion of the President as to the orders he may issue; but only regulates the manner in which those orders shall be communicated from superior to subordinate. The other requirement of the statute appears to be more open to objection. It seems to restrict the President in the exercise of his functions as Commander-in-chief; it prevents him from assigning the general to such place and position as he deems expedient; and so far forth it interferes with his power to dispose of the forces. If Congress may do this in respect to one officer high in rank, it may do it in respect to all officers, and the private soldiers, and may thus assume to itself the entire attributes of Commander-in-chief.

Third. *Those Powers which relate to the Employment of the Militia in the Service of the General Government.*

§ 472. In the first place it should be observed that the Constitution makes no provision for a national militia under the exclusive control and direction of the central government. The militia was, and still is, that of the states, the jurisdiction of the United States over it being at all times partial and exceptional. Thus the appointment of officers, and the training of this militia is, under every emergency, left to the states. Congress may adopt a mode of training, a system of tactics; and, if it does, the several states must follow that mode and

system ; if it does not, each state may choose one for itself. While any part of the militia are employed in the service of the United States, Congress may prescribe the rules for their government, — that is, may bring them under its code of military law. At all other times, under all other circumstances, the regulation and government are exclusively within the control of the respective states.

§ 473. Finally, Congress may provide for calling forth the militia in order to execute the laws of the Union, — that is, to aid the civil authority when the *posse comitatus* fails ; and in order to suppress insurrections and repel invasions, — that is, when the civil authority is utterly powerless, is entirely abandoned, and a resort to actual hostilities, to war, is necessary. This is the extent of the power which the general government may exercise over the militia ; and it will be observed that in no case can they be compelled to serve without the territory of the Union. The laws must be executed where they have force, and that is only within the country itself. Insurrections and invasions must be internal. We do not repel an invasion by attacking the invading nation upon its own soil. Still, there can be no question that the militia may be called out before the invaders have set foot upon our territory. It is a fair construction of language to say that one means of “repelling” an invasion is to have a force ready to receive the threatened intruders when they shall arrive. The same principle must apply to the suppression of insurrections. If the government must wait until the invaders are actually upon the soil doing their work of destruction, or until the insurgents have actually risen and commenced their process of social disorganization, before it can resort to all the means appropriate to secure its own safety and integrity, the United States is indeed the weakest of all nations.

§ 474. The language of the constitutional grant of power should be noticed. It is not that Congress may call forth, but may provide for calling forth, the militia. The legislature may therefore pass general laws applicable to circumstances that may arise in the future, and therein may empower the Executive — and perhaps any other designated individual — to sum-

mon the militia into active service, upon the happening of either contingency contemplated by the Constitution. Such a law is almost indispensable. The Congress is not always in session; and circumstances may arise during its recess demanding an immediate resort to arms, when a delay would be ruinous. Governed by these considerations, Congress at a very early day (1795) passed a statute authorizing the President to call forth the militia in the cases prescribed by the organic law, which is still operative. Under its provisions President Lincoln made his first requisition for 75,000 men.

§ 475. Two cases have been decided by the Supreme Court of the United States under the grant of power to call forth the militia. These cases, and especially the first in order of time, enter somewhat fully into a discussion of the relative powers of the nation and of the states over the militia, the nature and object of this military organization, etc., which it is unnecessary to quote. The reader is referred to the judgments themselves for the views of the different members of the court. I will only state the points decided. In the first case, *Houston v. Moore*,<sup>1</sup> it was held that the several states have concurrent jurisdiction with the United States to aid the general government in calling forth the militia, though not to hinder or prevent such calling forth. Therefore a statute of Pennsylvania, providing that persons called forth by the United States, and neglecting or refusing to obey the call, should be tried by a state court martial, and punished according to state laws, was declared to be constitutional and valid. I remark in passing, that the principle upon which this case rests is identical with that which supports the authority of the states to punish counterfeiters of national coin and securities, which was referred to in § 420. The states also acted upon the same principle in the aid which they gave to the general government during the late civil war, by promoting the enlistment of volunteers.

§ 476. In *Martin v. Mott*<sup>2</sup> it was decided that, under the authority given to the President by the statute of 1795, to call forth the militia under certain circumstances, the power is

<sup>1</sup> 5 Wheaton's R. 1.

<sup>2</sup> 12 Wheaton's R. 19.

exclusively vested in him to determine whether those circumstances exist; and when he has determined by issuing his call, no court can question his decision. This was the important doctrine settled by the case; but it was also held that when a person had been ordered to appear and report himself under such call, and had neglected to obey, and had in fact never appeared and been mustered in, he was still liable to be tried and punished by a court martial appointed by the authority of the United States, although the trial took place several years after the war was ended, to serve in which the militia had been ordered out.

*Conscription.*

§ 477. I am now brought to the question whether, under either of these classes of powers, — that to raise armies, and that to call forth the militia, — Congress may adopt the method of a draft or conscription. It is well known that the mode has been resorted to. In March, 1863, Congress passed an act for “enrolling and calling out the national forces.” The preamble of this statute sets forth the existence of the rebellion; of the war raging to suppress it; the necessity of a military force; and the duty of all persons to contribute towards its raising and support. The act then provides in substance for the enrolling of all citizens between the ages of twenty and forty-five years; that all these, with a few designated exceptions, should constitute the “national forces,” and be liable to serve when called out by the President. Provision is made, by means of local districts and officials, for completing the enrolment and enforcing the call; the quotas called from each district are to be drawn by lot, etc. The President made a call which was apportioned among the states, and the quotas of each state allotted to the several districts.

§ 478. It will be seen that this law resembles, in some of its practical features, the process of calling forth the militia; but in others it is entirely different. I remark, by way of introduction, that if such a statute may be passed in time of war, and adapted to a state of hostilities, it may also be passed in time of peace, and made the permanent policy of the govern-

ment. Congress, with two exceptions, gets no increase of direct *power* over military matters in time of war ; it has only new and singular opportunities for calling its powers into action, which would probably be left dormant in periods of tranquillity. The exceptions to this general principle are, the power to make rules concerning captures, and the power to provide for calling forth the militia. The conscription measures certainly do not fall within the first of these exceptions ; it will be shown in the sequel that they do not fall under the second. That Congress would not be likely to adopt this mode of replenishing its armies in peace, is plain enough ; its direct responsibility to the people is sufficient to prevent a resort to so stringent a method, except under circumstances of the direst necessity.

§ 479. I am aware of but one judicial decision in which the constitutionality of this conscription act was elaborately considered and passed under review. The case was *Knudler v. Lane*,<sup>1</sup> and arose in Pennsylvania. Its history was somewhat peculiar. In that state the Supreme Court consists of five judges. Each of these presides at *Nisi Prius* or Circuit, for the trial of jury causes, and the hearing of equity suits. According to their practice, it is customary, when a very important and difficult question is presented to a single judge at *Nisi Prius*, for him to call upon all his brethren for their assistance and advice in its decision ; and thus the parties have the opinions of a full bench at once.

The case now referred to arose as follows : The plaintiff had been enrolled, and was subject to a draft. He commenced a suit in equity against the officers who had the matter in charge, and prayed an injunction restraining them from prosecuting the draft ; the only ground alleged being the unconstitutionality of the conscription act. Application for a preliminary injunction was made to Woodward, J., at *Nisi Prius*. He called in the other judges, who differed in opinion ; Lowrie, C. J., Woodward and Thompson, JJ., holding the statute void, while Strong and Read, JJ., dissented. The preliminary injunction was therefore awarded. Shortly after, and be-

<sup>1</sup> 9 *Wright's* (45 Penn. St.) R. 288.

fore the case was finally disposed of, a general election took place in Pennsylvania, this pending litigation entering largely into the political canvass. Judge Lowrie's term of office having expired, he was a candidate for reëlection; but Judge Agnew was chosen in his place. A motion was soon after made before Strong, J., at *Nisi Prius*, to dissolve the injunction. The whole court were again called in, and Strong, Read, and Agnew, JJ., being the majority, dissolved the injunction; Woodward, C. J., and Thompson, J., now dissenting. The Supreme Court of Pennsylvania thus finally determined the act of Congress to be a constitutional exercise of power. It must be confessed, however, that the case partakes so largely of a certain political and partisan character, that it cannot be considered an impartial authority on either side. I shall endeavor, rejecting the unnecessary oratory of the judges, to present their legal arguments in a condensed form.

§ 480. Against the constitutionality of the statute, it was urged: (1.) That it was not valid under the power to call forth the militia, because the appointment of officers, etc., was not given to the states. This objection is unanswerable; and in fact it was conceded upon the other side, that the statute must be sustained solely under the power given to raise armies. (2.) It did not fall within that power, because the Constitution contemplated the raising of armies only by the ordinary method of enlistments; that this could not be said to be a necessary mode of exercising the power, because Congress had the express authority to call out the militia to suppress insurrections, and as this means had not been resorted to, none other could be called necessary. This, it will be noticed, was a repetition of the old argument so often urged in respect to other acts of the legislature, and so often answered by the Supreme Court. It was virtually saying that where one measure can be made use of, none other can be necessary, and none other can be adopted. (3.) It was objected that this statute deprived the states of their militia, which was sacredly reserved to them; that the persons between the ages of twenty and forty-five constituted the mi-

litia, and as the President might, under the law, call them all out, the states might be left defenceless.

§ 481. In favor of the act of Congress, and in reply to these objections, it was urged : (1.) That the statute was not rested on the power to call forth the militia. (2.) That the grant of power to raise armies includes all the means by which armies can be raised ; that this, and all other general grants of power, are complete ; that Congress has full liberty to make any choice of means that will tend to accomplish the end which the Constitution proposed. This was applying to the power to raise armies, the old argument which had been so many times enforced by the Supreme Court, and by it applied to the powers of taxing, of regulating commerce, of borrowing money. (3.) That the last objection stated by the opponents of the law, was merely an argument *ab inconvenienti*, and went to the policy of the measure, and not to the power of the legislature ; that it was also groundless, because by the express terms of the Constitution, Congress may call forth all the militia, and thus leave the states defenceless ; that an exercise of their conceded power over the militia might, therefore, be as stringent upon the states as could be the possible effect of this statute.

§ 482. It may be added, that the third objection can in substance be applied with equal force to the exercise of many other legislative functions by the general government—for example; that of taxation. If it be true that an act of Congress is unconstitutional because it may possibly deprive the states of all control over a subject-matter within their jurisdiction, then every tax law is invalid ; because, if the government chose to pursue such extreme measures, they might sweep away all taxable property, and leave the states no resources with which to sustain their governments.

In fact there seems to be a strong analogy between the power to tax and the power to raise armies. Both are in their nature somewhat hostile to the personal interests of the individual citizen ; yet both are confessedly indispensable to the existence of a government representing the sovereignty of the people. The exercise of the taxing power is unlimited ;



its extent cannot be defined ; it must be equal to the emergencies which shall arise in the history of the nation, — emergencies which no foresight can possibly anticipate. These doctrines have been announced by the Supreme Court, and have never been controverted. The extent of the power to raise armies is equally undefined and undefinable. The framers of the Constitution did not pretend to foresee the exigencies which must be met in the future. An army of a few thousands, sufficient to garrison the principal forts, and guard the exposed frontiers, may be enough under ordinary circumstances ; but a condition may arise when the entire able-bodied population must take the field, or the life of the nation is extinguished. It seems absurd to say that Congress may provide for one of these emergencies, but is powerless to meet the other. To sum the argument up in a word : the Constitution nowhere limits the size of the national army ; that must be determined by the needs of each particular occasion ; whatever means are necessary to raise an army of sufficient strength, are within the power and discretion of Congress. It is easy to declaim against a conscription law, but no danger is to be apprehended from it. The people will never permit their representatives to place it upon the statute book, unless they themselves are engaged in a death-struggle for national existence, and are willing to sacrifice not only their property, but their persons, for the country's salvation. Let us devoutly hope that an occasion for the sacrifice may never again arise.<sup>1</sup>

## SECTION XI.

### THE POWER OVER THE TERRITORIES.

§ 488. The express grants which directly relate to this power are the following : “ Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by

<sup>1</sup> As a matter of curiosity, I refer to *Ex parte Coupland*, 26 Texas R. 386, in which the validity of the conscription law of the Confederate Congress is sustained.

cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." — (Article I. Sec. VIII.) "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress. The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state." — (Art. IV. Sec. III.) The grant to Congress of authority to declare war, and to the President of power to make treaties, should be read in this connection.

§ 484. The United States may hold two different species of rights and capacities over the territorial regions belonging to it, namely: (1.) A mere proprietary right, or the right to acquire and dispose of the property in the soil, as owner thereof; and (2) a political right of dominion, or the power to govern these particular portions of the whole country. Whatever may be the extent of these two classes of powers and attributes, the exercise of them belongs to Congress. I shall consider them separately.

#### I. *The Right of Proprietorship.*

§ 485. When the Declaration of Independence dissolved the political connection between the colonies and Great Britain, most, if not all, the states had within their determinate boundaries certain amounts of undisposed lands, the proprietorship of which had resided in the Crown. It was assumed, by universal consent, that the title to these lands passed to the states in which they were respectively situated. But several of the states also laid claim to large tracts of unoccupied terri-

tory lying to the west of their ascertained boundaries, but still embraced within the vague descriptions of their charters. The fact of possession of this land by some of the commonwealths was an obstacle to the formation of the loose government established by the Articles of Confederation. Those states which had none of this virgin soil insisted that, having been wrested from the ownership of the Crown, it became the property of the entire political society which revolted and thereby destroyed the former title; that the advantages flowing from its possession belonged to all the states in common; that the proceeds of its sale should go to defray the war expenses of all the thirteen communities which had shared a common danger and assumed a common burden. Maryland in particular was emphatic in maintaining these views, and refused to enter the Confederation until 1781, because their justice and correctness had not been recognized. Very naturally the states which claimed the separate ownership over the western regions asserted the validity of their chartered rights, and for a while were unwilling to part with any peculiar advantages which might result to themselves from such proprietorship.

§ 486. The Congress of the Confederation plainly adopted the view that this land belonged of right to the nation; for, on the 6th of September, 1780, they passed a resolution strongly urging the states to cede the Western territory to the United States, and declaring that peace and union would be thereby promoted, and the credit of the government established. A second resolution of the 10th of October, 1780, pledged the faith of Congress that, if the cession were made as suggested, the lands should be disposed of for the common benefit of the United States, and be settled and formed into states which should become members of the Federal Union. These recommendations finally prevailed. New York and Virginia led the way, and other states followed their example. All had ceded their Western lands to the United States prior to the adoption of the Constitution, except North Carolina and Georgia. These two commonwealths completed the work immediately after the organization of the present government.

§ 487. This whole proceeding was national in its essential character; it assumed the existence of one nation, of which the states were subordinate parts; it resulted from a sentiment, somewhat undefined, but yet powerful, that the public domain belonged, not to some of the thirteen commonwealths, but to the one body politic which had revolted and declared itself independent. It is true that the process by which the result was reached was not entirely consistent with a perfected national theory; but it should be remembered that the whole organized government was a mass of glaring inconsistencies; that the people and the rulers were groping in the dark after the results of their positive acts. The nature of these results is plain, even though the path leading to them was somewhat tortuous. The Articles of Confederation recognized no United States except that "in Congress assembled," and gave to this Congress no power whatever to accept a cession of lands, or to hold and manage territory; but the existence of a nation back of this limited government, and of legislative powers in addition to those expressly conferred, was necessarily involved in the acts both of the states and of Congress.

§ 488. Upon the adoption of the Constitution, the United States was proprietor of the soil which had formerly belonged to the Crown, and over which the states had relinquished all claim. By the Treaty of Paris (1803) the French Republic ceded the territory of Louisiana. By the treaty of Washington (1819) Spain ceded the Floridas. Vast additions of soil were subsequently acquired from Mexico as the result of conquest. Within the present year the Russian possessions in America have been added to our domain. Although the Constitution is silent in respect to the acquisition of new territory, yet all departments of the government, and the people themselves, have assented to the construction which finds the power plainly conferred by the organic law. Indeed, none but those who would interpret the Constitution as though it were a penal statute, have ever doubted the authority of the nation, through some one of its governmental agents, to acquire new territory and add it to the domain of the United

States. Congress may declare war, and the President, as commander-in-chief, may wage war. One of the most common results of war is conquest; and unless the wars of this country are to be carried on differently from those of other nations, and unless we are to be deprived of the advantages of success, the possibility of conquest must be considered as included within the capacity to declare and wage war. The President, with the advice and consent of two thirds of the Senate, may make treaties. No kinds of treaties are specified; no limitations are placed; the language is as broad as possible; indeed, these international compacts are expressly declared to be the supreme law of the land. No species of treaty is more common than that of cession; and unless we would interpolate a restriction which the language of the Constitution does not require, and thereby place the United States in a condition of inferiority to all other countries, we must admit that territory may be acquired by treaty. Not only have presidents and senates repeatedly adopted these conclusions; not only has Congress ratified them by its legislation; not only have the people gladly confirmed the acts of their political agents, but the Supreme Court has also added its authoritative sanction. In *The American Insurance Co. v. Canter*,<sup>1</sup> the subject came before the court in such a manner as to require a formal decision. After the cession of Florida, Congress erected a territorial government therein, and conferred upon it certain legislative powers. The validity of particular acts of that local government was involved in the case. But a question lay still deeper: Had the United States the capacity to acquire new territory? If not, all the acts of Congress relating to Florida, and all the proceedings of the territorial legislature, were alike mere nullities. The court without difficulty answered the question in the affirmative. C. J. Marshall said: <sup>2</sup> "The course which the argument has taken will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union the powers of making war and of making

<sup>1</sup> 1 Peters' B. 511.

<sup>2</sup> *Ibid.* 542.

treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty." The court, in the celebrated case of *Dred Scott*, — which will be particularly referred to in the sequel, — distinctly affirmed the same doctrine.

§ 489. As the United States became sole proprietor of unoccupied lands which had belonged to the British Crown prior to the Declaration of Independence, and subsequently became proprietor of other tracts ceded by different sovereigns, the ordinary rights of ownership must also vest in the nation. Among these are the powers of use and of disposition. The United States may dispose of the soil which it owns. Whether we refer the capacity to the express provision that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" or whether we consider it as necessarily implied in, and flowing from, the power to acquire and hold the soil as owner, it is universally conceded that Congress may legislate in reference to the disposition of public lands; may, by general laws, prescribe a method to be followed in ordinary sales to individual purchasers; or may pass special statutes which operate as grants to determinate persons. Congress has adopted both of these modes, and its authority has never been judicially questioned. Under this power the system regulating the survey and sale of public lands has been organized, land offices established, and a code of regulations put in operation which affects private titles throughout a very large portion of the country. But Congress is not restricted to general or special statutes providing for the sale of the public domain. The legislative practice of aiding educational institutions and great schemes of internal improvement by gifts of land, has become settled as a part of the governmental policy. Land bounties to soldiers and their families have been repeatedly bestowed. Nor can there be any doubt that laws are within the competency of Congress, which provide for giving tracts to actual settlers, and which thus promote the general welfare by encouraging personal thrift and industry, a regular mode of life, and a stable society of landowners.

II. *The Right of Government.*

§ 490. *The District of Columbia and other ceded places.* — Congress has express power “to exercise exclusive legislation in all cases whatsoever” over the District of Columbia, and over all places ceded by the states for forts, dockyards, etc. This language is most comprehensive. It clothes Congress, in respect to these districts of territory, with all the capacities which are conferred upon it as the national legislature, and with those which are granted to the states. Upon whatever subjects Congress may generally legislate in respect to the whole country, and upon whatever subjects a state may generally legislate in respect to its own community, upon these subjects Congress may generally legislate in respect to these particular districts. But the language of the provision, broad as it is, must be taken with some restrictions. The express negative limitations upon the government, and particularly those contained in the Bill of Rights, which are directed against all departments alike, must apply as well to Congress while it is legislating for these districts which are exclusively under its authority, as while it is legislating for those portions of the country which are organized into states, and which are partially under its authority. Again, the very organization of the government, and the provisions for choosing official persons, show that in respect to a large mass of political subjects, Congress cannot legislate for the District of Columbia. Thus, that district cannot send a delegate to the House of Representatives, or to the Senate, nor can it appoint presidential electors.

§ 491. These propositions were necessarily involved in the judgment of the Supreme Court rendered in *Loughborough v. Blake*.<sup>1</sup> Congress had laid a direct tax upon the states, and had extended such tax to the District of Columbia. The suit was brought to test the validity of this statute. Chief Justice Marshall, who delivered the opinion of the court, observed: “The counsel who maintains the negative has contended that Congress must be considered in two distinct characters; in the

<sup>1</sup> 5 Wheaton's R. 317.

one character, as legislating for the states; in the other, as a local legislature for the district. In the latter character it is admitted the power of levying direct taxes may be exercised; but, it is contended, for district purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes." Without examining into the soundness of this distinction, which he would evidently reject, the Chief Justice proceeds to establish the following propositions as the conclusions to which the court arrives: that the general power of Congress to lay and collect taxes, duties, imposts, and excises, extends to all places over which the government extends, to the District of Columbia, and to all other territories of the Union, as well as to the organized states; that direct taxes may be apportioned among the territories and the District of Columbia, as well as among the several states; but that Congress is not bound to include the territories and the District within the operation of a law laying a direct tax. The court also held that the express power "to exercise exclusive jurisdiction in all cases whatsoever," within the District of Columbia, includes the power to tax. The reasoning which leads to these conclusions in relation to the function of taxing, must apply with equal cogency to the exercise of other legislative attributes by Congress.

§ 492. But is Congress absolutely omnipotent over these districts and territories? Is it, like the British Parliament, bound by no limitations save those which are self-imposed? This cannot be; nor does the language of the Constitution require a construction so much opposed to all our ideas of civil polity. The safeguards of individual rights, — those clauses which preserve the lives, liberty, and property of the citizens from the encroachments of arbitrary power, must apply as well to that legislation of Congress which is concerned exclusively with the District of Columbia or with the territories, as to that which is concerned with the states. The reasoning which leads to this conclusion is irresistible. A Bill of Rights is certainly no less important for the District of Columbia and for the territories than for that portion of the nation which is organized into states. If it were thought necessary that Con-



gress should be hedged round with restrictions while it is legislating for the inhabitants of the states, who may be partially protected by their local governments, how much more necessary that the same body should be restrained while legislating for the inhabitants of those districts and territories over which it has an exclusive control, an undivided sway. Now, it is to be remarked that the mandatory clauses of the first eight amendments — which constitute the national Bill of Rights — are clothed in the most general language; they make no exceptions; they apply to Congress in the exercise of all its functions; in general terms they cover its legislation for the District of Columbia and for the territories, as well as for the states. These clauses must, therefore, be compulsive upon Congress when it makes laws for the district or for the territories, unless the general language in which they are framed is controlled and modified by the particular language of the provisions which expressly relate to the district and to the territories. These special provisions declare that Congress shall have power “to make all needful rules and regulations respecting the territory,” and “to exercise exclusive legislation in all cases whatsoever over such district.” There is evidently nothing contradictory between the first of these provisions and the general restrictions of the Bill of Rights. In the second, the phrase “exclusive legislation” simply designates Congress as the only law-making body, without indicating in the least what laws may be made. The words, “in all cases whatsoever,” are the only ones which even appear to limit the general mandates of the first eight amendments; and here the contradiction is in appearance merely. The “all cases whatsoever” must be construed to mean all cases in which any legislation is possible. In fact, this affirmative grant of general legislative power is limited by the same negative mandates which affect all the other affirmative grants to the national government. Whatever laws may be passed, — and any may be enacted that are not forbidden by the express or the implied negative restrictions of the Constitution, — Congress is the sole body from which they must issue.

§ 498. These conclusions are strengthened by another con-

sideration, drawn from implied limitations upon the power of Congress to legislate for the District of Columbia and for the territories. The whole scheme of the national government implies the existence of some organized states, and the sole action of these states in constructing and carrying on the government. Thus Congress is composed of Representatives and Senators from the states; the President and Vice-President are chosen by electors appointed by the states. It is universally conceded that Congress cannot, by virtue of any power of legislation over the District of Columbia or the territories, change this constituted order, and provide for Representatives, Senators, or Presidential electors from the district or the territories. If Congress be thus confessedly limited in the exercise of its exclusive legislative function, by implied restraints of the Constitution, much more is it limited by those restraints which are express, and which are directed to it in terms which contain no exception.

§ 494. *The Territories.* — That Congress possesses the power to legislate for the territories; that this power is exclusive; that it may be exercised directly, or delegated to local governments set up by Congress and retained under its supervision, are propositions of constitutional construction settled by the uniform practice of the government and by the unvarying decisions of the Supreme Court. The contrary dogma, that the inhabitants of a territory have the entire control of their own local concerns, and may form their governments independently of the national legislature, never rose above the level of a mere party cry; it never obtained the assent of any department of the government, and has been distinctly repudiated by the Supreme Court.

The power of Congress to govern the territories being thus conceded to exist, to what source is it to be referred? Does it flow from the express clause which declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States"; or is it necessarily implied in, and a result of, the capacity to acquire and hold new territory by conquest or cession? I believe that this question is unimportant; that

from whatever source the power is derived, it is ample to meet all the necessities of the case; that the legislative attributes and functions, proceeding from either origin, are the same in kind and degree. That Congress has legislated in respect to the government of the territories, from the period immediately after the adoption of the Constitution to the present time; and that its legislation, however varying in form, has been adequate, are facts which cannot be disturbed.

§ 495. The subject was judicially examined for the first time in the *American Insurance Company v. Canter*.<sup>1</sup> In 1823 Congress passed "an act for the establishment of a territorial government in Florida," which created a territorial legislature with certain defined powers. This legislature erected a local court, and the validity of a judgment rendered by this tribunal was called in question. Chief Justice Marshall delivered the opinion, from which the following extract will be instructive: <sup>2</sup> "The treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not however participate in political power; they do not share in the government till Florida shall become a state. In the mean time Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. Perhaps the power of governing the territory belonging to the United States, which has not by becoming a state acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." Again, he remarks: "In legislating for them [the territories] Congress exercises the combined powers of the general and of a state government."

<sup>1</sup> 1 Peters' R. 511.

<sup>2</sup> Ibid. 542.

§ 496. In the celebrated case of *Dred Scott v. Sandford*,<sup>1</sup> the power of Congress to legislate for the territories was discussed at great length. The complicated facts of this case need not now be stated. It is enough to say that in the year 1820 Congress passed a statute which declares that slavery shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. The court considered itself called upon to determine whether Congress was authorized to pass this law. They pronounced the act null and void. The judgment of the court and the opinions of the individual judges are too long to be quoted or condensed. My purpose will be attained by stating the course of argument pursued by Chief Justice Taney, in which all the judges concurred, except Justices McLean and Curtis who dissented from the reasoning and from the conclusions, and Mr. Justice Nelson, who expressed no opinion upon the validity of the law in question.

§ 497. The following propositions are discussed and maintained in this judgment of the Chief Justice: The government has an unlimited authority to acquire territory by treaty or conquest, for the purpose of having the same formed into new states, but not for the purpose of holding the same as colonies. The power to govern such territory is then examined. By a very elaborate argument, — which, it must be conceded, is extremely artificial, — the conclusion is reached that the clause in Article IV. was intended to apply solely to the unoccupied lands which had belonged to the Crown prior to the Declaration of Independence, and which had been surrendered by the states during the Confederation. The ordinance of 1787, passed by the Confederate legislature, and reenacted by the national Congress, which established local governments for this territory, and prohibited slavery therein, could not, therefore, be taken as a precedent for similar legislation in reference to regions subsequently acquired. Ample power to legislate for the new territories does, however, exist; and it results from

<sup>1</sup> 19 Howard's R. 393.

the necessities of the case, from the antecedent capacity to acquire and hold additional domain, and from the fact that Congress, as the agent of the whole nation, is the only body which can make laws for the government of communities not organized into states. As the districts acquired by treaty or conquest belong to the whole country, the legislation in respect to them must be for the common benefit, and cannot discriminate in favor of or against the inhabitants or institutions of any particular portion of the United States. In making laws for these territories, Congress is restrained by the negative clauses of the first eight amendments to the Constitution; it cannot deprive a person within their boundaries of life, liberty, or property without due process of law, or do therein any other of the acts inhibited by the Bill of Rights. Property in slaves is recognized and protected by the Constitution; it is of as high a character as property in any other things; Congress cannot discriminate against it. A statute prohibiting slavery in the territories where all citizens have a common right to go and to carry the things owned by them, deprives such citizens of their property without due process of law, and is therefore forbidden by the Bill of Rights, and is void.

§ 498. Such is an outline of the judgment to which a majority of the court assented. I will very briefly examine its positions.

The declaration that the United States may acquire territory to be formed into states, but not to be indefinitely held as colonies, is a proposition clearly without any practical value; it is a rule which cannot by any possibility be enforced. Territory may be acquired, and must be governed by Congress. How long it shall remain in its condition of dependence, or when it shall be erected into a state, is a matter to be determined exclusively by the national legislature. Congress cannot be compelled to act; nor can the territories be clothed with the attributes of states without the action of Congress. "New states may be admitted by the Congress into this Union." This language is simply permissive. When the admission shall be effected, and how long it shall be delayed, are matters residing entirely within the Congressional discretion.

The very elaborate argument to show that the special clause of Article IV. applies only to the territory which belonged to the United States at the adoption of the Constitution, and that the power to govern the domain subsequently annexed must be referred to the general capacity to acquire and hold additional soil, seems at best to have been an unnecessary labor. The power "to make all needful rules and regulations respecting the territory" cannot be any more comprehensive, cannot include any greater variety of particular measures, than the undefined power of legislation which is conceded to belong to Congress by virtue of the nation's proprietorship in the regions to be governed. If there be any difference in the extent of the attributes flowing from these two sources, it would seem that those proceeding from the latter are the greater and the more efficient. But to whichever of these origins the power to legislate for the new territories be referred, its existence is unquestioned, and the limitations upon it are the same.

That the territories are acquired and held for the whole nation, and that legislation in respect thereto should be for the common benefit, are truisms. To exactly the same extent, and in exactly the same manner, all the legislation of Congress should be for the general welfare of the United States. But of the particular means which tend to produce this general welfare, Congress is the only judge.

The position assumed by the court, that Congress, in the exercise of its legislative function for the territories, is bound by the restrictive clauses of the Bill of Rights, cannot be successfully attacked. Indeed, it can make no difference whether that body proceeds under the express grant of Article IV., or under its power implied in the capacity to acquire and hold additional soil; in either case it is equally hedged round and trammelled by the safeguards of individual rights that are contained in the first eight amendments. No American citizen in whose veins flow any drops of Saxon blood, and who inherits the results of the glorious struggle which his English forefathers maintained with power and prerogative, can deny or question this doctrine.

§ 499. While the doctrines thus far considered are either

entirely correct, or entirely harmless, the concluding and substantial portion of this celebrated judgment has rendered the Dred Scott case a by-word and a hissing. It more than any thing else strengthened the convictions and intensified the feelings of the North against the institution of slavery; it shook the confidence of the country in the Supreme Court as the ultimate and authoritative interpreter of the Constitution, and in one day undid the good work which a steady devotion for more than sixty years to the cause of nationality had accomplished. I mean that portion of the judgment which pronounced property in slaves to be equal in character and degree to property in any other things; which declared slavery to be guarded and upheld by the national Constitution, and not to be the mere creature of local laws, confined to the very districts within which those laws have force; and which decided a statute of Congress prohibiting slavery in the new territories to be invalid, because it deprived a person of his property without due process of law. The events of the last few years, and especially the thirteenth amendment to the Constitution, have happily removed all occasion for any discussion and criticism of these doctrines of the Supreme Court; they have passed out of the field of present activities; let them be buried in oblivion.

## SECTION XII.

### EXPRESS PROHIBITIONS UPON THE EXERCISE OF LEGISLATIVE POWERS.

§ 500. I shall now pass to the consideration of express prohibitions upon legislative action. These apply either to Congress, or to the states, or to both. Many of them have already been referred to in the foregoing sections of this chapter. I shall pursue the following order: (1.) Examine those directed to the national legislature, or to it and the state legislatures in common; and (2.) Examine those directed alone against the state legislatures. These several prohibitory clauses are found in Sections IX. and X. of Article I. Section IX. contains eight subsections. Of these the fourth, fifth, and sixth relate

to taxation and the regulation of commerce, and have been sufficiently discussed. The first refers to the slave trade, and is partly obsolete; it certainly requires no illustration. The second guards the privilege of the writ of habeas corpus. The examination of this all-important clause will be postponed until I shall treat of the Executive powers. The remaining paragraphs will be now passed under review.

First. *Those Prohibitions which are directed to Congress, or to it and the State Legislatures in common.*

#### I. *Bills of Attainder.*

§ 501. Article I. Section IX. § 8 is in these words: "No bill of attainder or *ex post facto* law shall be passed." In this connection is to be read, § 1 of Section X. "No state . . . shall pass any bill of attainder or *ex post facto* law."

Both Congress and the state legislatures are therefore forbidden to pass these enactments; and if they should under any form violate the mandates of the organic law, their attempted legislation would be absolutely void. What is a Bill of Attainder? The phrase has a technical meaning. In England such statutes were well known, and their terrible character led our forefathers to forbid any resort to them. A bill of attainder in England is a statute passed by Parliament declaring a person by name, or a class of persons by description, to be guilty of crime, and ordering him or them to be capitally punished. A similar statute inflicting a less degree of punishment than death, was technically known as a Bill of Pains and Penalties.

In two late cases before the Supreme Court of the United States, *Cummings v. The State of Missouri*, and *Ex parte Garland*, Mr. Justice Field, delivering the opinion of a majority of the court, defined the phrase in language somewhat different in form, but the same in substance. He says: <sup>1</sup> "A Bill of Attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the

<sup>1</sup> 4 Wallace's R. 323, 324.



meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. . . . These bills are generally directed against individuals by name; but they may be directed against a whole class. . . . These bills may inflict punishment absolutely, or may inflict it conditionally."

§ 502. Mr. Justice Miller, pronouncing the opinion of the dissenting judges, in the same case, thus describes bills of attainder.<sup>1</sup> "Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial; the sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule; the investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry."

§ 503. There could be no engine of tyranny more terrible than Bills of Attainder, and Bills of Pains and Penalties. No trial is necessary; no legal evidence; no notice to the accused; no opportunity of defence; no examination of witnesses; even no crime. The life and property of every person would be at the mercy of the legislature, were these legislative-judicial proceedings allowed. Mr. Justice Chase, in an early case in the Supreme Court, uses language which I will quote.<sup>2</sup> "These prohibitions very probably arose from the knowledge that the

<sup>1</sup> 4 Wallace's R. 387, 388.

<sup>2</sup> 3 Dallas's R. 389.

Parliament of Great Britain claimed and exercised the power to pass such laws under the denomination of bills of attainder, or bills of pains and penalties, the first inflicting capital, and the other, less punishment. These acts were legislative judgments, and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed (the case of the Earl of Strafford in 1641): at other times they violated the rules of evidence to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath, or the oath of a wife against her husband, or other testimony which the courts of justice would not admit (the case of Sir John Fenwick in 1696): at other times they inflicted punishments, where the party was not by law liable to any punishment (the banishment of Lord Clarendon in 1669, and of Bishop Atterbury in 1723): and in other cases they inflicted greater punishment than the law annexed to the offence (the Coventry Act, 1670). The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender. With very few exceptions the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such and similar acts of violence, and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder."

Until the most recent times the national judiciary has never been called upon to question the validity of any statute of Congress or of a state legislature on the ground that it was a bill of attainder. The Test Oath Cases, however, decided during the past year, involve such an inquiry, and the intrinsic importance of those determinations requires that I should examine them with some care.

§ 504. *Cummings v. Missouri: Statement of facts.*—The first and leading case is that of *Cummings v. The State of Missouri*.<sup>1</sup> In June, 1865, the State of Missouri adopted a constitution which contained a provision for a stringent test

<sup>1</sup> 4 Wallace's R. 277.

oath. Article II. Section 3, provided that "no person should be deemed a qualified voter who has ever been in armed hostility to the United States, or to the lawful authorities thereof; . . . or has ever given aid, comfort, countenance or support to persons engaged in any such hostility; or has ever in any manner adhered to the enemies of the United States; . . . or has ever by act or word manifested his adherence to the cause of such enemies, or his desire for their triumph; . . . or has ever been engaged in guerilla warfare against loyal inhabitants of the United States; or has ever knowingly and willingly harbored, aided, or countenanced any person so engaged." The section goes on to describe in minute detail other acts of a similar character, which shall disqualify a person from voting. It proceeds to declare that no person having done any of these enumerated acts shall be capable of holding any office under the state; or of being an officer in any corporation public or private; or of acting as professor or teacher in any educational institution.

Section 6 of the same article provides for an oath to be taken in order to entitle a person to vote, which is in the following terms: "I do solemnly swear that I am well acquainted with the terms of the third section of the second article of the constitution of the State of Missouri, adopted in the year 1865, and have carefully considered the same; that I have never, directly or indirectly done any of the acts in said section specified." The oath then requires a pledge of future loyalty to the United States.

Section 7 of the same article requires every state officer, every officer of a corporation, and every teacher to take the same oath within sixty days after the constitution takes effect; and in default thereof, the office or position is to become *ipso facto* vacant.

Section 9 of the same article declares that no person shall, after the expiration of sixty days after the constitution takes effect, be permitted to practice as an attorney or counsellor at law; "nor after that time shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or

preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath."

Section 14 prescribes certain penalties of fine, or imprisonment, or both, to be inflicted upon those persons who shall hold or exercise any of the offices, positions, or professions designated, without having taken the required oath.

The Reverend Mr. Cummings, who was and had been a priest of the Romish Church, was indicted, tried, and convicted, for exercising his profession without having taken the oath required. The highest court of Missouri having sustained this conviction, Mr. Cummings brought his case to the Supreme Court of the United States for review. It was claimed that these provisions of the state constitution were void, on the ground that they were bills of attainder and *ex post facto* laws.

§ 505. *Ex parte Garland: Statement of facts.* — The second case was *Ex parte Garland*,<sup>1</sup> being an application by Mr. Garland for permission to practice in the Supreme Court of the United States as an attorney and counsellor, without taking the oath required by a statute of Congress and the rules of the court. Mr. Garland had been admitted as an attorney and counsellor of the court in 1860. He took a part in the rebellion, having been a member of the Confederate Congress from May, 1861, until the downfall of the Confederacy. In July, 1862, Congress passed a statute requiring all United States officers to take the following oath: "I do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto." In January, 1865, Congress passed a further statute which declared that, "No

<sup>1</sup> 4 Wallace's R. 333.

person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or to the bar of any Circuit or District Court of the United States, or of the Court of Claims, as an attorney or counsellor of such court, or shall be allowed to appear and be heard in such court, by virtue of any previous admission," without having first taken the oath above set forth.

In July, 1865, Mr. Garland received from the President a pardon, of which the operative words were, that the President did thereby "grant to the said A. H. Garland a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion."

Mr. Garland applied to the court for permission to resume and continue his practice at the bar, without taking the above-mentioned oath. He based his application on two grounds: that the pardon restored him to all privileges and removed all disabilities; if not, that the statute of Congress requiring the oath was void, being a bill of attainder, and an *ex post facto* law.

§ 506. *Decision of the Court.* — Five members of the court, Field, Clifford, Nelson, Grier, and Wayne, JJ., held in the Cummings case that the provisions of the Missouri Constitution, so far as they applied to him, were null and void, being both a bill of attainder and an *ex post facto* law. Four judges, Chase, C. J., and Swayne, Davis, and Miller, JJ., dissented, and were of opinion that the provisions in question were neither a bill of attainder, nor an *ex post facto* law.

The same majority held in the Garland case, that the statute of Congress was both a bill of attainder and an *ex post facto* law, so far as it affected him and others in the same situation, and that the President's pardon relieved him from all disabilities which could have attached by virtue of his participation in the rebellion.

§ 507. *Opinions and arguments of the Court.* — I pass by at present all portions of the judgments except those which consider the question whether the legislation under review came within the description of bills of attainder. Mr. Justice Field delivered the opinion of the court in each case. In the Cum

mings case, after maintaining the proposition, that to deprive a person of an office or profession, or to prevent him from engaging in an office or profession, was to impose a penalty or punishment upon him ; and after giving the definition of bills of attainder quoted in § 501, he proceeds :<sup>1</sup> “ If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that state to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution. In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

§ 508. “ The results which would follow from clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed, and the case actually presented, is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach, unless the presumption be first removed by their expurgatory oath ; — in other words, they assume the guilt and adjudge the punishment conditionally.

<sup>1</sup> 4 Wallace's R. 324.

The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the supposed case would be openly avowed; in the case existing, it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In the Garland case, the court say on this point, that the reasoning employed in *Cummings v. The State of Missouri*, applies with equal force there, and leads to the same conclusion.

§ 509. *Opinion of the Minority.* — Mr. Justice Miller delivered one opinion of the dissenting judges, applicable to both cases. After describing bills of attainder in the language already quoted (§ 502), he proceeds: <sup>1</sup> "It remains to inquire whether, in the act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills. It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder. Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown.

<sup>1</sup> 4 Wallace's R. 389.

But in such cases the law leaves nothing to be done to render its operation effectual, except to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise; and all that was required to ensure their punishment was to prove that association. No person is pointed out in the act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in relation to *ex post facto* laws, that it inflicts no punishment. A statute, then, which designates no criminal, either by name or description, which declares no guilt, pronounces no sentence, and inflicts no punishment, can in no sense be called a bill of attainder."

§ 510. It is certainly proper to express an opinion upon the correctness of decisions so important as these. It can hardly be said that the judgments of the court thus rendered, have established the doctrine contained in them. A ruling upon a question never before presented, made by a bare majority of the judges, is certainly law for the parties litigant; but neither in England nor in America would the law for the whole



country be considered as definitively settled by such an adjudication ; the question would still be treated as open to discussion. I cannot resist the conviction, that the court has fallen into a grave error, and that the positions taken by the dissenting judges are entirely correct. Neither the clauses in the Missouri Constitution, nor the act of Congress, can be fairly brought within any received definition or description of bills of attainder. The second of the suppositions made by Mr. Justice Field, and quoted in § 507, is identical in import with the attainder of the Earl of Kildare and his followers. In the one case a class of persons was, and in the other case a class would be, pointed out by description, and declared guilty of crime, and sentenced to suffer the penalty. In both cases each particular person of the class must be identified ; in the one, by showing that he was a follower of the traitorous nobleman, in the other, by showing that he was a clergyman. The third supposition of the learned judge is identical with the attainder of the Earl of Clarendon : the bill of attainder there enacted that the Earl should be forever banished ; and if he returned within the realm after the first of February, 1667, he should suffer the penalties of treason ; but if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect.

§ 511. The attempt to show that the provisions of the Missouri Constitution, and of the act of Congress, are the same in substance as those contained in a conditional attainder like that of Lord Clarendon, is more acute than successful. The difference is not one of form. In the conditional attainder the guilt is formally declared and the punishment affixed, which can only be removed by the performance of some act. In the Missouri Constitution and statute of Congress, there is no guilt declared as resting upon any person. To say that the clauses of the state organic law presume the guilt of all clergymen, and that the act of the national legislature presumes the guilt of all counsellors at law, which presumption can only be removed by an oath of expurgation, is to say that the constitution of Missouri presumes all its voting citizens, and all its state and local officers to be guilty ; in other words, that a bill

of attainder is launched against all who compose the political community. The learned judge who delivered the opinion of the majority, seems to have confounded the characteristics of bills of attainder with those of *ex post facto* laws; for many of his remarks seem to apply with greater force to the latter species of statutes. But the important feature in all this legislation, which relieves it of the odious character of bills of attainder, is the entire absence of the judicial element. There is no adjudication; no usurpation of the functions of courts; no persons or class of persons, either by name or by description, are, by the mere force and operation of the enactment, convicted of any crime existing or alleged. The provisions of the Missouri Constitution, and of the act of Congress, may be of very doubtful policy; they may be opposed to Republican ideas; they may entirely fail of their design; they may be void as *ex post facto* laws; but they clearly are not bills of attainder.

## II. *Ex post facto* Laws.

§ 512. The national and state legislatures are forbidden to pass *ex post facto* laws. What are such laws? The term used in its literal sense, appears to mean laws after the fact; after the deed or occurrence to which they apply. Is this the meaning of the phrase, or is it limited to a more special and technical signification? All laws which directly or inferentially operate upon matters already transpired, — or in other words, all retro-active laws, — strike us at once as contrary to the ordinary course of legislation, as impolitic, and unjust. So strong is the sentiment of repugnance to such kind of legislation, that there have not been wanting judges and courts who hold such laws absolutely void; who include them within the general category of *ex post facto* laws; who, even if the last proposition be not admitted, deny that any legislatures in a free and Republican country, have the capacity to enact such statutes, which, it is asserted, contravene the fundamental principles of justice, and are inconsistent with the notion of a civil society based upon the rights of man. As opinions of this sort not unfrequently find utterance from members of the bar

and of the bench, I propose to examine with some care the meaning of the phrase *ex post facto*, and the powers of legislatures to pass retro-active statutes; although the weight of judicial authority is so overwhelming, that the matter is settled beyond all dispute.

§ 513. I will first state the propositions which are established. *Ex post facto* is a term of technical import. It does not include all legislation operating upon antecedent facts and circumstances; it does not apply to civil legislation at all; it has only reference to the criminal law. "*Ex post facto laws*" must, therefore, *ex vi termini*, be criminal laws. They are such, and only such, as declare an act criminal, and provide for its punishment, which, at the time of its commission, was not a crime; or such as change the punishment of a known crime in any other manner than by mitigating it, and are to operate upon past as well as future offences; or such as alter the rules of evidence or other procedure, so that conviction shall be made easier, and are to apply as well to those who committed the act prior, as to those who committed it subsequent, to the passage of the statute. Although legislative measures which fall within the foregoing description, generally provide for a judicial trial of the person charged with crime, and affect the penalty to be imposed upon him as the result of such trial, or the evidence by which a conviction is obtained, yet this is not necessary; the law would be no less *ex post facto*, which inflicted the penalty by its own direct operation. All *ex post facto* laws are, therefore, retro-active; but all retro-active laws are not *ex post facto*.

§ 514. Congress and the state legislatures do possess the power to adopt and enforce measures relating to civil affairs, which shall have a retro-active effect, unless they are restrained by some other provisions in the national or state constitutions than the one under consideration. There are several such provisions; — the one forbidding states to pass laws impairing the obligation of contracts; that prohibiting the taking of private property for public purposes without compensation; that surrounding life, liberty, and property, with the safeguards of "due process of law," and the like. But all these, far-reach-

ing as they are, do not cover the entire ground; there are many instances in which the legislatures have passed, and may still pass, statutes retro-active in their effect, and yet not render themselves obnoxious to any restrictions or inhibitions of the organic law either of the United States or of the local commonwealths. I should remark in passing, that most of the states have reënacted the prohibition upon *ex post facto* laws in their own constitutions, while a few have gone farther and prevented their legislatures from passing retro-active statutes of a civil nature.

§ 515. I shall now examine the course of decision in the Supreme Court of the United States, expository of this restrictive provision; and shall then refer to a few leading cases in the state courts.

The first case is *Calder v. Bull*<sup>1</sup> (1798). The facts were shortly as follows:— A court of probate in Connecticut had, in 1793, rendered a decree refusing to admit a certain will to probate; the time for appeal had expired, and the rights of the parties, so far as they could be established according to the course and practice of the courts in that state, were fixed. Thereupon, in 1795, the legislature of Connecticut passed a law setting aside the decree of the probate court, and ordering a new hearing. This having been had, a new decree was made establishing the will, which decree was affirmed by the highest court of the state. The case was then carried to the Supreme Court of the United States, and the action of the lower courts was sought to be reversed, on the sole ground that the state statute was *ex post facto*, and therefore void. Mr. Justice Chase delivered the leading opinion, from which I quote some passages. After a few observations upon the power of any legislative body in a free country to make laws manifestly contrary to justice, he proceeds:<sup>2</sup> “I shall endeavor to show what law is to be considered an *ex post facto* law. The prohibition in the letter is not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures shall not pass laws after a fact done by a subject or citizen, which

<sup>1</sup> 3 Dallas's R. 386.

<sup>2</sup> *Ibid.* 390.

shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retro-active operation. I do not think it was intended to secure the citizen in his private rights of either property or contract. I will state what laws I consider *ex post facto*, within the words and intent of the prohibition.

§ 516. “(1.) Every law that makes an action done before the passage of the law, and which was innocent when done, criminal, and punishes such action :

“(2.) Every law that aggravates a crime, or makes it greater than it was when committed :

“(3.) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed :

“(4.) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. These and similar laws are manifestly unjust and oppressive. In my opinion the true distinction is, between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective ; but every retrospective law is not *ex post facto*. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive ; and it is a good general rule that a law should have no retrospect. But I do not consider any law *ex post facto*, within the prohibition, that molifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rule of evidence for the purpose of conviction. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent act criminal and punishing it as a crime.” Patterson and Iredell, JJ., delivered opinions to the same effect. The statute of the Connecticut legislature was therefore sustained.

§ 517. In the case of *Fletcher v. Peck*<sup>1</sup> (1810), Chief Justice Marshall had occasion to remark upon the meaning of the phrase. The facts of the case are complicated, and will be referred to in another portion of this section. The Chief Justice says :<sup>2</sup> "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is, then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment." This definition of Chief Justice Marshall has been spoken of by subsequent writers and judges as wonderfully clear, comprehensive, and accurate.

§ 518. In *Watson v. Mercer*<sup>3</sup> (1834), Mr. Justice Story says :<sup>4</sup> "It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally ; but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws which punish a party for acts antecedently done, that were not punishable at all, or not punishable to the extent or in the manner described. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively."

The same doctrine was reaffirmed in *Carpenter v. Pennsylvania*,<sup>5</sup> decided in 1854. The examination of the recent and most important Test Oath Cases is postponed to the close of this subsection.

§ 519. The current of decision in the highest national tribunal being thus uniform, I turn to a few leading cases in the

<sup>1</sup> 6 Cranch's R. 87.

<sup>2</sup> *Ibid.* 188.

<sup>3</sup> 8 Peters' R. 88.

<sup>4</sup> *Ibid.* 109.

<sup>5</sup> 17 Howard's R. 456.

state courts. In *Lord v. Chadbourne*<sup>1</sup> (Maine, 1856), Appleton, J., delivering the opinion of the court, said: "The legislature may pass laws altering, or modifying, or even taking away, remedies for the recovery of debts, without incurring a violation of the provisions of the Constitution which forbid the passage of *ex post facto* laws." In the same state, the subsequent case of *Coffin v. Rich*<sup>2</sup> contains observations made by Davis, J., which need criticism. He says:<sup>3</sup> "There can be no doubt the legislatures have the power to pass retrospective statutes, if they affect remedies only. Such is the well-settled law of this state. But they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities. This subject was elaborately discussed by Mellen, C. J., in the case of the *Kennebec Purchase v. Laboree*,<sup>4</sup> and it was there held that the Constitution secures citizens against the retro-active effect of legislation upon their property. And in regard to the question what is a retro-active law thus unconstitutional, the court adopted the definition of Judge Story, — a statute which creates a new obligation, or imposes a new duty." Turning to this case of *Kennebec Purchase v. Laboree*,<sup>4</sup> we shall find that it was decided upon provisions in the Constitution of Maine similar in words and import to those in the organic law of the Union, forbidding a person to be deprived of life, liberty, or property without due process of law, and that it had no relation whatever to the clause concerning *ex post facto* laws. The facts of the case show that it called in question a statute which operated directly to transfer the lands of one person to another owner. The decision is in strict accordance with all true constitutional interpretation, but is no authority for the position that state legislatures are restricted, beyond the provisions of their own, or the national, constitution, from passing laws which affect civil rights alone, and which are retro-active.<sup>5</sup>

§ 520. In New Hampshire the analogous clause in the Constitution is peculiar. It is as follows: "Retrospective laws

<sup>1</sup> 2 Adams's (42 Me.) R. 429.

<sup>2</sup> 1 Hubbard's (45 Me.) R. 507.

<sup>3</sup> 1 Hubbard's (45 Me.) R. 514.

<sup>4</sup> 2 Greenleaf's R. 275.

<sup>5</sup> See Opinion of Mellen, C. J., 2 Greenleaf's R. 288-294.

are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences." This language is certainly untechnical, and somewhat obscure; but it is far broader than that of the United States Constitution. The Supreme Court of the state have had frequent occasions to give it a construction; and I will briefly refer to the most important cases. In *Woart v. Winnick*<sup>1</sup> (1826), the court determined that an act of the state legislature repealing a prior statute of limitations, was void as respects all actions pending at the time of the repeal, in which the cause of action was destroyed or barred by that statute. Plainly, such repealing act was not *ex post facto*; and this the court concede, placing their judgment entirely upon the other branch of the constitutional provision which forbids retrospective laws "for the decision of civil causes."

In *Rich v. Flanders*<sup>2</sup> (1859), the question was again presented to the Supreme Court of New Hampshire, and examined with great learning and ability. The statute under review was one changing the long-established rules of evidence, and admitting the parties to suits to testify in their own behalf. The point for decision was as to the constitutionality of this act when applied to causes of action which had accrued, and rights which had become vested, prior to its passage. The opinion was delivered by Mr. Justice Sargent. After determining that the law was not *ex post facto*, he proceeds to examine the meaning of "retrospective laws," as the term is used in the Constitution. Remarking that "*ex post facto*" has received a distinct technical signification; that it is confined to criminal legislation, and even to such particular measures as retro-act to the injury of a person accused, to such as make an act a crime which was innocent, or increase its punishment, or render conviction easier, — he proceeds to inquire whether "retrospective laws" have not also a defined technical meaning. Do they include all statutes relating to civil matters which retro-act? They do not. They do not embrace such legislative measures as affect the remedy alone. Mr.

<sup>1</sup> 3 New Hamp. R. 473.

<sup>2</sup> 2 Chandler's (39 N. H.) R. 304.



Justice Sargent cites the case of *De Cordova v. Galveston*,<sup>1</sup> from Texas, and the cases of *Hope v. Johnson*,<sup>2</sup> *Vanzant v. Waddell*,<sup>3</sup> and *Brandon v. Green*,<sup>4</sup> from Tennessee, in which the same construction was given to identical clauses in the constitutions of those states. He thus concludes the discussion: <sup>5</sup> "We deduce from all the decisions upon the subject this rule: that any statute which changes or affects the remedy merely, and does not destroy or impair any vested right, — which does not destroy any existing right of action or defence, or create any new ground of action or defence, is not a retrospective law in the sense in which such laws are prohibited by the Constitution, though acting upon past contracts and rights previously acquired and vested, even though in changing or affecting the remedy the rights of parties may be incidentally affected thereby." The court holds that rules of evidence are part of the remedy; that when a person enters into a relation from which a right or obligation may spring, he has no vested right that the rules of evidence then existing, applicable to the establishment of his relation, shall remain the same when the right or obligation is sought to be judicially enforced. The whole reasoning of this opinion will be found instructive in connection with the kindred subject of laws impairing the obligation of a contract.

§ 521. In *The State v. Paul* <sup>6</sup> (1858), the Supreme Court of Rhode Island was called upon to examine a statute prohibiting the sale of spirituous liquors. Ames, C. J., says: <sup>7</sup> "The statute in question is supposed to be an *ex post facto* law, because, although it does not in terms punish one for having sold or kept liquor for sale before the passage of the act, yet it absolutely prohibits manufacturers and others from selling, or keeping for sale within the state, liquors manufactured or bought by them previous to the passage of the act. It is obvious that this objection proceeds either upon a misconstruction of the statute in question, or upon a misunderstanding of the constitutional meaning of an *ex post facto* law. The statute,

<sup>1</sup> 4 Texas R. 470.

<sup>2</sup> 2 Yerger's R. 125.

<sup>3</sup> Ibid. 260.

<sup>4</sup> 7 Humphrey's R. 130.

<sup>5</sup> 2 Chandler's R. 322.

<sup>6</sup> 2 Ames's (5 R. L.) R. 185.

<sup>7</sup> Ibid. 190.

it is admitted, does not in words punish that as an offence which was not such before its passage. That it does in effect prohibit manufacturers and others who have manufactured or bought liquor before the passage of the act, from selling it or keeping it for sale within the state afterwards, and thus affects injuriously to them the value of such property on their hands, does not make it an *ex post facto* law in the constitutional sense. To meet the well-settled definition of such a law, a statute must not only retro-act, but must retro-act by way of criminal punishment upon that which was not a crime before its passage."

§ 522. Perhaps the most interesting, and, in many respects, most extraordinary case which has arisen, involving the meaning and effect of the clause which prohibits *ex post facto* laws, is *Mary Hartung v. The People*<sup>1</sup> (1860). The facts were as follows: Mrs. Hartung was indicted, tried, convicted, and sentenced to be hung for the murder of her husband, who died in 1858. The judgment was affirmed by the Supreme Court, January 9th, 1860. The prisoner immediately carried the case to the Court of Appeals for review. At the time of the offence, trial, conviction, and affirmance by the Supreme Court, the provisions of the Revised Statutes controlled the case, which defined the crime of murder, and declared that, upon conviction thereof, the prisoner should be sentenced to death by the court trying him, which sentence should be carried into effect within certain definite and short limits of time. After the affirmance by the Supreme Court, and before the argument in the Court of Appeals, the legislature passed a statute which in terms repealed all former laws relating to the crime of murder and to the punishment thereof, with no saving clause excepting offences already committed but not as yet punished. This new statute defined the crime of murder, and established the punishment, as follows: That the person convicted should be confined for at least one year in the state prison, and after the expiration of the year should suffer death by hanging whenever the governor of the state should issue his warrant for that purpose. This being the law of the state when the case was

<sup>1</sup> 8 Smith's (22 N. Y.) R. 95.

argued before the Court of Appeals, the counsel for the prisoner urged that this woman could not be punished at all ; that the statute under which she was convicted had been abrogated ; that the new enactment could not be applied to her case, for to do so would make it *ex post facto*.

§ 523. After disposing of the first point, and holding that, there being no reservation, the prisoner could not be punished under the original statute, but must be, if at all, under the new one, Denio, J., who gave the opinion of the court, proceeds :<sup>1</sup> “ And this leads me to the second question to be considered, whether it is competent for the legislature, after the conviction of a person prosecuted for murder, to change the punishment which the law has annexed to the offence, for another and different punishment, as was attempted to be done in this case. It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation ; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offences of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except by a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions ; because the rule exists in the form of an express written precept, the binding force of which no one disputes. No state shall pass any *ex post facto* law, is the mandate of the Constitution of the United States. The present question is, whether the provision under immediate consideration is such a law within the meaning of the Constitution. I am of opinion that it is. The substituted punishment is made applicable to offences committed under the old law, where convictions have already been had. To abolish the penalty which the law attached to a crime when it was committed, and to declare it to

<sup>1</sup> 8 Smith's R. 103.

be punishable in another way, is, as respects the new punishment, the essence of an *ex post facto* law."

§ 524. The learned judge then quotes the language of Marshall, C. J., in *Fletcher v. Peck*, and of Chase, J., in *Calder v. Bull*, and proceeds: "Neither of the cases in which these remarks were made, involved any question as to the kind or degree of change in the punishment of an offence already committed, which might be made without a violation of the Constitution. A rule upon that subject is now to be laid down for the first time. In my opinion, then, it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might be lawfully applied to existing offences; and so, in my opinion, the term of the imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline or penal administration, as its primary object, might also be made to take effect upon past as well as future offences, — as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, and the like. Changes of this sort would operate to increase or to mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the act of 1860 in the punishment of existing offences of murder, does not fall within either of these exceptions. If it is to be construed to vest in the governor a discretion to determine whether the convict should be executed, or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to the sentence. If he grants it, the jurisdiction of the case ends. The act in question places the convict

at the mercy of the governor in office at the expiration of one year from the time of his conviction, and of all his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice, or without notice. The sword is indefinitely suspended over his head, ready to fall at any moment. It is not enough to say, even if that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether or not the other would be the most severe in a given case. That would depend upon the temperament and disposition of the convict. The legislature cannot thus experiment upon the criminal law. This law, moreover, prescribes one year's imprisonment at hard labor in a state prison, in addition to the punishment of death. As the convict is, consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an *ex post facto* law. It changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed." The court unanimously held the statute void as to past offences; so that, the old law having been repealed with no saving of cases already arisen, such crimes were absolutely unpunishable in New York, and several murderers escaped all penalty and were discharged, — a striking illustration of the heedlessness and ignorance which characterize so much of modern legislation.

§ 525. *The Test Oath Cases.* — The citations already made are enough to show the very general uniformity in the construction which the national and state courts have placed upon the clause of the Constitution forbidding *ex post facto* laws. I shall, therefore, conclude this subject with an examination of the recent Test Oath cases, *Cummings v. Missouri*,<sup>1</sup> and *Ex parte Garland*.<sup>2</sup> The facts of these cases have been already stated with sufficient fulness in §§ 504, 505. On the argument it was urged in support of the Missouri constitution, and

<sup>1</sup> 4 Wallace's R. 277.

<sup>2</sup> *Ibid.* 333.

of the law of Congress, that these several enactments were within the competency of the bodies which adopted them ; that Congress has power to prescribe the qualifications which must be possessed by persons practising at the bar of the national courts ; that the states have the like power to prescribe the qualifications which must be possessed by persons exercising any avocation within their territorial limits ; that the legislative provisions in question were adopted under and by virtue of this power ; that the forbidding a person to exercise any profession or calling unless he shall comply with certain conditions, is not in any legal sense a punishment or penalty ; that the act of Congress, and the constitution of Missouri do not, therefore, fall within any received definition of *ex post facto* laws. +

§ 526. *Opinion of the Court.* — The opinions pronounced by the majority, and by the minority, are too long to be quoted in full, and I shall simply give an abstract of the reasoning which led the court, and the dissenting judges, to the conclusions which they respectively reached. The positions taken by Mr. Justice Field, who delivered the prevailing opinion in both cases, are as follows : He admits that Congress has general authority to prescribe the qualifications which must be possessed by all persons practising at the bar of the national courts ; and that the states have a like authority to prescribe the qualifications which must be possessed by those who exercise the various professions and callings within their territorial limits. He qualifies this admission by asserting in the Cummings' case, that "it by no means follows that, under the form of creating a qualification or attaching a condition, the states can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the state over matters of internal police, but whether that power has been made, in the present case, an instrument for the infliction of punishment against the inhibition of the Constitution."<sup>1</sup> Again, in the Garland case, he says :<sup>2</sup> "The legislature may undoubtedly prescribe qualifications for the office [of attorney and counsel-

<sup>1</sup> 4 Wallace's R. 319.

<sup>2</sup> Ibid. 379.

lor], to which he must conform, as it may, when it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is, not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment against the prohibition of the Constitution." In these passages is to be found the key to the judgment of the court.

§ 527. The nature of the "qualifications" which a legislature may impose as a condition to the exercise of any pursuit or profession, is next examined; and the several requirements demanded by the Missouri constitution as a prerequisite to the discharge of a clergyman's duties, are declared to have no connection whatever with a person's fitness for that sacred office, and to be in no sense "qualifications." The question is then considered at length whether these various statutory provisions impose a punishment. Many of the acts referred to in the Missouri constitution, and in the statute of Congress, were not, at the time when committed, crimes of any description; others were offences of a very high, perhaps of the highest, grade; but to none of them had the punishment of disqualification from pursuing any particular profession or business, been made applicable. A statute or constitution which prohibits all persons from exercising the profession of a clergyman or of a lawyer if they have done certain specified acts regarded as criminal, and which requires all persons intending to commence or to continue the exercise of such professions to take an expurgatory oath, assumes the guilt of those individuals who neglect or refuse to take the oath; and the prohibition resting upon them under these circumstances is, therefore, a punishment or penalty imposed on account of their assumed commission of the specified offences, because it restricts the freedom of the individual, and deprives him of the means of acquiring property. The statute of Congress demanding a test oath from lawyers, and the clauses of the Missouri constitution requiring a test oath from clergymen, are, therefore, *ex post facto* laws, and void.

§ 528. *Opinion of the Minority.* — The opinion of the dis-

senting judges, delivered by Mr. Justice Miller, maintains the following positions: That the legislatures, national and state, have, within their respective jurisdictions, complete authority over the various professions and avocations, and over the qualifications demanded from persons engaging in the same; that the *status* of the lawyer or of the clergyman is not a legal right, but only a privilege conferred by the legislature under such conditions as it shall deem proper; that a statute prohibiting a person from entering the legal or clerical profession, or from continuing to exercise the functions of a lawyer or a clergyman, does not inflict any penalty or punishment, because it does not deprive the individual of a legal right, but only affects a personal privilege which is completely under the control of the law-maker. The conclusion is thus reached, that the clauses of the Missouri constitution, and the statute of Congress, are not *ex post facto* laws, because they neither in terms declare any acts to be crimes and impose a punishment, nor do they indirectly inflict a penalty, forfeiture, or punishment, but they are confined to matters of a purely civil nature, to the qualifications requisite for entering upon, and pursuing, certain trades, professions, and callings.

§ 529. It is certainly proper to examine these two opinions which are thus opposed to each other in every particular, and to ascertain, if possible, the rules of constitutional construction which shall reconcile them, and place the judgment of the court upon a correct basis. The national and state legislation directly or inferentially affected by these cases, is extensive and most important; it covers the qualifications of officeholders and of voters; and it cannot be said that all the questions which may arise therefrom have been put to rest by this single determination of the Supreme Court.

The actual judgments rendered in the Cummings and Garland cases, upon the facts therein contained, were correct. It seems to me clear that the Missouri constitution on the one hand, and the law of Congress on the other, deprived those persons of legal rights which had been acquired by, and vested in, them under the preëxisting law; that such deprivation was a consequence of criminal acts which Cummings and Gar-



land had done, and was, therefore, a forfeiture or penalty imposed upon them on account of their offences; and, finally, that as the acts when done were not thus punishable, the legislation, so far as it affected these individuals and others similarly situated, came within the definition of *ex post facto* laws, and was void.

§ 520. While agreeing with the very conclusion and judgment of the court in these cases, I cannot accept to its full extent the reasoning either of the majority or of the dissenting judges. Both Mr. Justice Field and Mr. Justice Miller failed in one most important function belonging to the judicial office, — that of deciding upon the facts, and upon the facts alone, as they are presented in the case before the court. What were these facts? They were few and simple. Cummings had entered the clerical profession, and was performing the duties of his office, according to the law of Missouri as it existed prior to the adoption of the new constitution in 1865. Garland had been admitted to the bar of the Supreme Court of the United States by virtue of regulations which were in operation and sanctioned by Congress before the civil war broke out. The legislation virtually said to these men: You shall not hereafter pursue your professions, because you have committed criminal acts. Here was a plain deprivation of a vested right, a right conferred by preëxisting law, a right legal in its nature, and having a pecuniary value as property. This deprivation can be considered as nothing else than a penalty, forfeiture, or punishment.

§ 531. Such were the facts involved in these cases; and the rule of law applicable to them would seem to be simple and clear. But neither the court nor the dissenting judges were content to confine themselves to these facts, or to the legal principles governing them and determining the rights of the litigant parties. The prevailing opinion embraces within its reasoning and its conclusions, not only lawyers and clergymen already admitted to their professions, and thus clothed with a peculiar status, but also all persons seeking admission. It not only pronounces the destruction of an existing right of membership in a particular trade or business to be a punish-

ment, but also asserts that disqualification to enter upon such calling is no less a penalty. It not only declares that lawyers and clergymen have a legal right to continue in their professions, but also maintains that all persons have a legal right to be admitted thereto, and that a statute abridging such right or capacity, on account of some prior offence, imposes a punishment upon the person affected by the law. The court plainly, therefore, assumed to decide far more than they were called upon to determine. Nor was there any necessity for this procedure on their part. The *ratio decidendi* by which the conclusion is reached that the Missouri legislation was void as against Cummings, and that the statute of Congress was void as against Garland, does not require that the same rule should also be applied to those who are simply seeking admission into any profession or pursuit. Most of the opinion delivered by Mr. Justice Field is, therefore, demonstrably a mere dictum, and has no binding efficacy as a precedent, no quality of an express adjudication upon an actual state of facts involved in a legal controversy. Whatever force and effect can be given to it, must be due entirely to its merits as a voluntary discussion of propositions not yet judicially settled.

§ 532. There is certainly a distinction between the two classes of persons against whom the legislation under review is directed, — those already admitted by the preëxisting law to membership in any particular trade, profession, or calling, and those applying to be admitted since the new conditions were imposed, — a distinction in substance and not of form, and yet a distinction which the court and the dissenting judges have entirely ignored. The fallacy of the reasoning which runs through the prevailing opinion is, that it completely confounds legal *rights* vested in a person, and mere *capacities* inhering in a person to acquire rights, or to have rights conferred upon him. Rights and capacities are different in their essential nature. Destroy or abridge the former, and you inflict a forfeiture or a penalty; destroy or abridge the latter, and you only affect a privilege, from which a right might perhaps have arisen, but from which no right has yet arisen. To illustrate by a familiar and plain example: Married persons are in a far

different position legally from those unmarried. The former are clothed with a status which draws after it innumerable vested rights between the spouses and against the world, both of person and of property; the latter have only a capacity, which enables them, if they please, to assume the status of marriage; but it cannot be said of them, with any propriety of expression, that they have a vested legal right to be married. A law which should break the existing bond between husband and wife, would destroy legal rights, and thereby create a forfeiture, or perhaps a penalty. A law which should declare that no persons shall hereafter marry until they have reached the age of twenty-one, would abridge an existing capacity, but would not impair any legal right, and therefore would not impose any forfeiture. Legal rights cannot exist without corresponding legal duties resting upon some correlative parties; legal rights must avail against some persons, either against determinate individuals, or against all mankind. If the capacity of an unmarried person to marry be a legal right, against whom does it avail, and upon whom does the corresponding duty rest? But the reasoning of the court must inevitably hold that a statute destroying the capacity to marry under the age of twenty-one, would inflict a penalty or forfeiture upon all unmarried persons below that age, in the same manner that a law dissolving the marriage status would impose a forfeiture upon those affected thereby.

§ 533. This illustration may be immediately applied to the cases of lawyers, clergymen, and the like. After individuals have been clothed with the professional status according to the preëxisting law, they become possessed of vested legal rights flowing from that condition; to destroy or abridge these rights is to impose a forfeiture; to destroy or abridge them as a consequence of criminal acts which were not thus punishable when committed, is to violate the provisions of the Constitution inhibiting *ex post facto* laws. But to say that no person shall hereafter be admitted to the legal or the clerical profession until he has complied with certain new conditions, impairs no legal right; it only abridges a former capacity, a capacity which was expressly or tacitly granted by the legislature, and which

is under the control of that body. The people of Missouri and the national Congress may have required, and undoubtedly did require, the new conditions from persons intending to enter the bar, or the ranks of the clergy, as a consequence of the fact that many had participated in acts deemed to be criminal, and did intend to shut the door against such participants; but their legislation cannot be said to inflict a punishment, penalty, or forfeiture, because it takes away, abridges, or impairs no legal right whatever. My conclusion therefore is, that the constitution of Missouri and the statute of Congress, so far as they are applicable to persons admitted to the professional status, are *ex post facto* laws, and void; so far as they are applicable to persons not admitted but desiring to enter, they are opposed to no restrictions of the national Constitution, and are valid.

§ 534. These views were lately adopted and enforced by the Supreme Court of the District of Columbia, in *Ex parte Magruder* (Feb. 12, 1867). Magruder had never been admitted to the bar of that court. An application was made, based upon the decision of the Supreme Court of the United States in the *Cummings* and *Garland* cases, that he might be admitted without taking the test oath required by the act of Congress and the rules of the court. The application was, however, denied, for reasons substantially the same as those set forth in the preceding sections.

§ 535. It hardly need be said that, in my opinion, those clauses of the Missouri constitution which relate to voters, and prescribe conditions for the exercise of the electoral franchise, are opposed to no prohibition of the national Constitution. The subject of voting is completely within the control of the states; the electoral franchise is not a right, but a privilege, which must be conferred by the positive law of each commonwealth. Whenever a state desires to enlarge or restrict the number of voters, it may do so, and no legal rights are impaired. Had the Missouri constitution said in terms that all persons guilty of disloyal practices should in future be cut off from the number of voters; or had it specified individuals by name who were to be thus cut off, these provisions would not

come within the definition of *ex post facto* laws, because no legal right would have been abridged, and no punishment, penalty, or forfeiture inflicted. One consideration is absolutely decisive of this whole question. Assume that the clauses of the Missouri constitution, so far as they require a test oath from voters, should be declared void, what advantage would those persons gain who refuse to take the oath? Could they be admitted to vote? Certainly not; because the organic law of the state does not confer any such right upon them. To that constitution we must go in order to ascertain who are possessed of the electoral franchise; such privilege must be conferred in affirmative terms,—silence does not grant it; the fundamental law of the state does grant it to certain specified classes; among whom persons refusing to take the test oath are not included. This fact at once shows that the voter possesses a mere privilege; that the states have supreme control over this privilege; that taking it away, or, what is the same thing, refusing to confer it, does not impair a right, and cannot be regarded as a penalty or punishment. The highest court of Missouri has very recently affirmed the validity of those clauses in the state constitution, which regulate the subject of voting, and it is supposed the case will be reviewed by the Supreme Court of the United States. I add in the footnote a few important cases in which the nature of *ex post facto* laws has been examined by state courts.<sup>1</sup>

### III. *Other express Prohibitions.*

§ 536. The ninth section of the first article provides, in paragraph six, that “no money shall be drawn from the treasury but in consequence of appropriations made by law.” The importance of this restriction is evident. It is, indeed, the very key-stone which holds together the arch of constitutional powers and limitations. Withdraw this, and all others would become mere words, with no force or efficacy. How far would an ambitious President be restrained from the accomplishment

<sup>1</sup> *Matter of Dorsey*, 7 Porter's (Ala.) R. 294; *Mississippi v. Smedes*, 26 Miss. R. 47; *Cohen v. Wright*, 26 Cal. R. 273; *State v. Garesché*, 36 Missouri R. 256; *State v. Cummings*, 36 Missouri R. 263.

of his designs by the clause forbidding appropriations for the army for more than two years, if he might draw money from the treasury without appropriation? This single example is enough to illustrate the importance of the provision in question. There could be no safety without it, and the security of the whole governmental fabric depends upon its strict and literal observance by all officers and departments of the administration.

The seventh paragraph of the same section, which declares that "no title of nobility shall be granted by the United States, and no person holding any office of profit or trust under the same shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state," does not seem to require particular comment.

Second. *Those Prohibitions which are directed alone against the State Legislatures.*

§ 537. Passing now to those restrictions which are specially laid upon the states, and which are grouped together in the tenth section of article first, we find that most of them have already been considered in those sections of this work which discuss the power to lay taxes, regulate commerce, raise armies, provide navies, and engage in war. Others, such as the prohibition to coin money, emit bills of credit, and make any thing but gold and silver coin a tender in payment of debts, have been sufficiently referred to in their proper connection. The clause forbidding a state to enter into any treaty, alliance, or confederation with a foreign power, or with another state, was involved in the general discussion of the nationality of the United States.

*Impairing the Obligation of Contracts.*

§ 538. One of the special limitations contained in the tenth section is, however, of the utmost importance, and has given rise to more forensic argument, and occasioned a greater number of judicial decisions, than all other provisions of the Constitution combined. I propose to give it a careful and ex-

haustive examination, referring to judgments both of the national and the state courts, and endeavoring to arrive at some general principles by which all cases may be controlled. The clause is short and apparently simple: "No state shall pass any law impairing the obligation of contracts." Simple as this prohibition seems, it is, nevertheless, very difficult to reach its full meaning, so as to decide whether a particular law is inhibited by it or not. We must determine the legal signification, force, and effect of three words; we must ascertain what a "contract" is, what the "obligation" of a contract is, and what "impairing" that obligation is. Upon each one of these three points there has been a vast amount of controversy. I shall, therefore, proceed to examine these questions separately, calling to our aid the decisions of the Supreme Court of the United States, and of the various state courts, giving to the former, as is proper, the greater authority.

I. *What are Contracts within this Provision of the Constitution?*

§ 539. A contract is defined by C. J. Marshall to be "an agreement in which a party undertakes to do, or not to do, a particular thing." Contracts may be express, or implied; express, when the parties formally and in positive terms declare what is to be done or forborne; implied, when the stipulations are not thus definitely set forth, but are inferred from the conduct, situation, or relations of the parties, and the promise is treated as though actually made, because in good faith it ought to have been made. Contracts may also be executory, or executed; executory, when the promise or stipulation is yet unperformed; executed, when the promise or stipulation has been performed.

1. *Executory Contracts.*

§ 540. Adopting the foregoing elementary definitions and divisions, I say —

Express executory contracts made between private persons are plainly within the restrictive provision of the organic law. This has never been doubted or questioned.

Implied executory contracts between private persons are as

plainly and confessedly covered by the general terms of the Constitution.

## 2. *Executed Contracts.*

§ 541. When the parties have performed the stipulations agreed upon, and the rights are no longer future or executory, but have become fixed, so that the compact is now in the nature of a grant of property, power, or rights, is there still such a contract within the meaning of the Constitution, that the state legislatures are forbidden to step in, annul the perfected results of the executed agreement, and restore the parties to their original position? The Supreme Court of the United States has answered this question in the affirmative, and has decided that executed as well as executory contracts are embraced within the restrictive operation of the Constitution. In many such cases a party would also be protected by the clause in most, if not all, of the state constitutions, forbidding statutes which deprive a person of his property without due process of law.

§ 542. The first case in order of time was *Fletcher v. Peck*.<sup>1</sup> The legislature of Georgia had by statute conveyed certain lands to particular grantees. Subsequently the legislature of the same state revoked the former grant, on the ground of alleged corruption, and transferred the lands to other persons. The parties, plaintiff and defendant in the suit, represented these two sets of grantees, and the whole case turned upon the validity of the second statute. Chief Justice Marshall delivered the opinion of the court. After defining the word "contract," and stating the distinction between executory and executed agreements, he proceeds: <sup>2</sup> "Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates not-

<sup>1</sup> 6 Cranch's R. 87.

<sup>2</sup> *Ibid.* 137.



withstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

§ 543. "If under a fair construction of the Constitution grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting a state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every description. If contracts made with a state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States in adopting that instrument have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative powers of the states are obviously founded on this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state." The court unanimously declared the second statute passed by the Georgia legislature to be void.

§ 544. The same doctrine was emphatically stated by the court in *Terret v. Taylor*<sup>1</sup> (1815), the opinion being delivered by Mr. Justice Story. Again, in the great case of *Dartmouth College v. Woodward*<sup>2</sup> (1819), Chief Justice Marshall uses the following language:<sup>3</sup> "If a doubt could exist that a grant is a contract, the point was decided in *Fletcher v. Peck*, in which it was laid down . . . that whether executed or

<sup>1</sup> 9 Cranch's R. 43, 52.

<sup>2</sup> 4 Wheaton's R. 518.

<sup>3</sup> *Ibid.* 656.

executory both [forms of contract] contain obligations binding on the parties, and both are equally within the provisions of the Constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts."

§ 545. These early decisions of the Supreme Court of the United States have been repeatedly followed by the same tribunal. The latest case which involves and restates the same principle is *McGee v. Mathis*<sup>1</sup> (1866). In 1850 the United States gave to the State of Arkansas certain wild lands upon certain conditions, which were accepted by the state. In 1851 the state legislature passed a statute providing for the sale and drainage of these lands; and for that purpose a transferable scrip was issued, which was paid to contractors who constructed drains and levees, and which could be received in payment of any of these lands which should be taken up by the holder. To encourage the reclamation of these lands, the same statute enacted "that all said lands shall be exempt from taxation for the term of ten years, or until they shall be reclaimed." In 1855 this latter clause was repealed, and the lands were included in the general taxation. In 1857 another statute was passed which imposed a special tax on the same lands. The plaintiff had, before 1855, become owner of a quantity of land-scrip, with which he, after 1855, took up and located a number of sections. The action was brought to relieve the portions thus taken up and located from the state tax. The Supreme Court of the United States declared the statute exempting these lands from taxation to be a contract between the state and the scrip-holders; and pronounced the repeal invalid as to those persons who were holders at the time.

§ 546. By the preceding judgments of the highest national court, the following general propositions have been established as a part of the constitutional law of the land:

An executed agreement, or grant, between private persons, by means of which property, powers, or rights are transferred

<sup>1</sup> 4 Wallace's R. 143.

from one to the other, is a contract, with the obligation of which no state may interfere.

A state may also make a grant to a private person, by means of which rights are conferred upon him ; and a contract is thus perfected between them, the obligation of which the state may not afterwards impair by altering, amending, or repealing the terms of the grant.

By far the greater number of judicial questions which have arisen and been passed upon by the courts, have related to grants made by states to private persons ; the contention being whether such grants amounted to contracts so as to be binding upon the commonwealths which made them. It will be immediately perceived that this controversy involves the whole subject of national and state sovereignties. The partisans of state sovereignty have uniformly contended that the supreme disposing power of a state cannot be limited ; that what one legislature has done another may always undo ; that a contract between a state and a private person, by which the former confers absolute rights upon the latter, is a simple impossibility. Through the mass of forensic and judicial discussion growing out of this subject I must now conduct the reader. We shall find much discrepancy, much conflict ; but at the same time we shall discover certain grand principles firmly established by that court which has the power to decide authoritatively upon the meaning and import of constitutional provisions. I shall, therefore, take up in order several species of legislative acts, and inquire whether they are contracts.

### 3. *Offices.*

§ 547. When the law-making power of a state has created an office with a certain salary and emoluments, and a person has been appointed to the official position, and is fulfilling its duties and receiving its perquisites, is the state legislature, in the absence of any provision of the local constitution, restrained by the organic law of the nation from abolishing the office before the term thereof has expired, and from depriving the officer of the gains which he would otherwise have received ? In other words, is the statute creating an office,

taken in connection with the appointment of a person thereto, an executed contract between the state and that person, which is protected by the Constitution of the United States? The decisions of courts and the dicta of judges have, with hardly a dissenting voice, answered this question in the negative, and determined that public offices are not contracts.

§ 548. In the case of *Warner v. The People*,<sup>1</sup> the legislature of New York had virtually abolished an office, and had created another in its stead. The power to do so depended entirely on the state constitution, and that fundamental law was alone invoked in deciding the question. The legislative act was held to be invalid. But in the course of his opinion Chancellor Walworth uttered a dictum which, coming from so able a judge, is entitled to much weight. He says: "The fees and emoluments of office may not only be reduced by direct legislation, but incidentally by the division of towns and counties, and the erection of new courts, etc., as the public good may from time to time require."

§ 549. The case of *Connor v. The City of New York*<sup>2</sup> directly presented the question for decision. The court held, that in creating an office either by the state constitution or by state legislation, and in appointing an individual thereto, no contract arose between him and the state; that he occupied only a position of personal trust; that his fees or salary were not to be regarded as the legal consideration of an agreement on his part to hold the office for the prescribed period. The following general propositions were laid down: When an office is created by the constitution, and the term and salary thereof are defined, the people in their sovereign capacity may, by a new constitution, terminate both without regard to the rights, the interests, or the expectations of the incumbent. An office created by law may be repealed by law, without regard to the term or future salary of the officer intrusted with its exercise. There is no contract, either express or implied, between a public officer and the government whose agent he is. Nor have public officers any proprietary interest in their offices, or any property in the prospective compensation attached thereto. A

<sup>1</sup> 2 Denio's R. 272, 281.

<sup>2</sup> 2 Sandford's R. 355.

public officer is an agent elected or appointed to perform certain political duties in the administration of the government.

§ 550. This case of *Connor v. The City of New York* was carried to the Court of Appeals of New York, and was there affirmed.<sup>1</sup> In delivering the opinion of the court, Mr. Justice Ruggles said: "Public offices in this country are not incorporeal hereditaments; nor have they the character or qualities of grants. They are agencies. With a few exceptions they are voluntarily taken, and may at any time be resigned. They are created for the benefit of the public, and not granted for the benefit of the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office holder."

§ 551. In the case of *Knoup v. The Piqua Bank*,<sup>2</sup> Mr. Justice Corwin, speaking for the Supreme Court of Ohio, says: "In America a public officer is only a public agent or trustee, and has no proprietorship or right of property in his office. He is but a trustee for the public, and whenever the public interest requires that the office should be abolished, or the duties of the office become unnecessary, the incumbent cannot object to the abolition." A similar dictum was uttered by the same court in *The Toledo Bank v. Bond*.<sup>3</sup> The Supreme Court of Pennsylvania announced the doctrine in *The Commonwealth v. Bacon*,<sup>4</sup> in which Mr. Justice Duncan said: "The broad ground taken on the part of the Mayor is, that the city council cannot legally diminish his salary during his continuance in office. It has been endeavored to support this position both on the principle of contract, and because it is forbidden by the Constitution. This cannot be considered in the nature of a hiring for a year, because it was not obligatory upon the mayor to serve out the year. The services rendered by public officers do not partake of the nature of contracts, nor have they the remotest affinity thereto." The same court again asserted the doctrine in the way of a dictum by

<sup>1</sup> 1 Selden's R. 285, 295.

<sup>2</sup> 1 Ohio State R. 603, 616.

<sup>3</sup> 1 Ohio State R. 655.

<sup>4</sup> 6 Sergeant & Rawle's R. 322.

Mr. Justice Rogers in *The Commonwealth v. Mann*,<sup>1</sup> and finally made it the very ground of decision in *Barker v. The City of Pittsburgh*.<sup>2</sup>

§ 552. In the Supreme Court of the United States, that final arbiter of rights under the Constitution, there is but one decision directly in point, though there are dicta uttered by judges of such acknowledged learning and ability that their opinions have a certain weight of authority. Thus in *Dartmouth College v. Woodward*,<sup>3</sup> Mr. Justice Story said: "The State legislatures have power to enlarge, repeal, or limit the authority of public officers in their official capacity, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very good reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the legislature." He compared offices to naked powers, revocable at pleasure. Mr. Chief Justice Marshall also expressed an opinion to the same effect. In the case of *The West River Bridge Company v. Dix*,<sup>4</sup> the doctrine was approved by a judicial dictum. Finally, in *Butler v. Pennsylvania*,<sup>5</sup> the Supreme Court of the United States met the question, and unanimously disposed of it in the same manner as was done by the state courts, whose judgments have been quoted.

§ 553. It may, therefore, be considered as a settled point of constitutional law, settled both by the national and the state courts, that a public office bears no resemblance to a contract; and that state legislatures have full power over the public offices of the commonwealth, except so far as they may be restrained by the local constitutions. The clause of the United States Constitution which prohibits state laws impairing the obligation of contracts, has no application whatever to this subject.

#### 4. Licenses.

§ 554. May a license to perform some act, or carry on some business, — as that of selling spirituous liquors, or dealing in

<sup>1</sup> 5 Watts & Sergeant's R. 403, 418.

<sup>2</sup> 4 Barr's R. 49.

<sup>3</sup> 4 Wheaton's R. 518, 693.

<sup>4</sup> 6 Howard's R. 507, 548.

<sup>5</sup> 10 Ibid. 402.

lottery tickets, — issued by a state to private individuals in pursuance of law, either with or without the payment of a fee, be annulled before the period of time during which it was to last has expired, by a subsequent legislative act repealing or modifying the original statute under which the license was issued? In other words, is such a license a grant, so as to be a contract between the state and the individual to whom it is issued? We shall find comparatively few cases in which this question is directly involved, and authoritatively answered. The word "license" is one familiar in the Common Law nomenclature. It there means a personal permission given by the owner of lands to an individual, for that person to do some act or series of acts upon the licensor's lands, which acts, but for the permission, would have been trespasses. Such licenses may be oral or written. In either case the Common Law declares a simple license, even though money had been paid for it, to be revocable at the will of the licensor.<sup>1</sup> Are licenses from a state similar in their nature, mere naked permissions, and revocable at will? A very decided preponderance of judicial authority has answered this question in the affirmative. Upon principle there would seem to be no doubt of the correctness of this position. A license from the state authorizing a person to do some act which is generally forbidden, is a mere permission which excepts the individual from the operation of laws that would otherwise prohibit him, as well as all other citizens, from doing the specified act. Thus, when a statute provides for licensing persons to sell spirituous liquors, it virtually says, spirituous liquors shall not be sold as a general rule, but to this rule there shall be some exceptions, and those who are licensed constitute the exceptions. A state license of the kind we are considering, has, therefore, no element of a contract, and does not fall within the protection of the national Constitution. These conclusions are supported by judicial dicta and decisions to which a brief reference will now be made.

§ 555. In *Hirn v. The State of Ohio*,<sup>2</sup> the Supreme Court

<sup>1</sup> See *Wood v. Leadbitter*, 13 M. & W. 838.

<sup>2</sup> 1 Ohio State R. 15, 21.

of Ohio say, while discussing the effect of a law which repealed a former statute permitting licenses to be issued: "The court is not disposed to question the power of the legislature in a matter of this kind, connected as it is with the public policy and domestic regulations of the state. Upon the ground of protecting the health, morals, and good order of the community, we are not prepared to say that the legislature does not possess the power to revoke such license. But where there has been no forfeiture of the license by abuse or violation of its terms, common honesty would require that the money obtained for it should be refunded in case of its revocation." This passage is, however, a mere dictum, not necessary to the judgment of the court, for it was held that existing licenses were not revoked by the repealing statute.

In the case of *Adams v. Hackett*,<sup>1</sup> the Supreme Court of New Hampshire use the following language: "Bancroft & Co. had a general license authorising them to sell until April 1, 1850. It was a license granted by virtue of law. It had cost them a consideration to make it perfect, — the fees for recording; and although the amount is very trifling, still it was a consideration. They had acquired rights under their license which had become fixed, and so far as those rights were concerned, the repealing law would be retrospective, and of course inoperative. Statutes which take away or impair vested rights acquired under existing laws, are retrospective and unconstitutional." It will be noticed that this language has particular reference to the New Hampshire constitution which, as we have seen, in terms forbids all retrospective laws. Still the passage is an authority for the position that a license is a contract; for it is only by regarding it as a contract between the state and the licensee, that he could acquire any vested rights by virtue thereof. A subsequent case, however, in the same state, pronounces the passage a dictum unnecessary for the decision of the question before the court, and repudiates its doctrine.

§ 556. In *Phalen v. Virginia*,<sup>2</sup> the Supreme Court of the United States uses language which, although not the very

<sup>1</sup> 7 Foster's R. 289, 293.

<sup>2</sup> 8 Howard's R. 163.



ground of the decision, indicates the opinions of the judges who composed that high tribunal. The contention had respect to a statute of Virginia repealing a former law under which licenses to set up lotteries had been issued. The court actually held, as the basis of their judgment, that the prior statute did not make the licenses issued thereunder certain for any specified time; and also that Phalen's license had become inoperative and obsolete, so that he retained no rights under it. Mr. Justice Grier expressed an opinion that such licenses were not contracts at all, so as to be binding upon the legislature. After speaking of a variety of statutes which state legislatures may confessedly pass, such as recording acts, statutes of limitation, and the like, which must incidentally influence contracts, he observed: "If reasons of sound public policy justify legislative interference with contracts of individuals, how much more will it justify the limitation of licenses so injurious to public morals. . . . Without asserting that a legislative license to raise money by lotteries cannot have the sanctity of a franchise or a contract in its nature irrevocable, it cannot be denied that the limitation of such a license as the present, is as much demanded by public policy as other acts of limitation which have received the sanction of the court."

§ 557. From these mere dicta I pass to a few cases where the point was expressly presented for decision. In *Calder v. Kurby*<sup>1</sup> (Mass. 1856), a license to sell liquors had been granted for a certain period; the fee paid therefor was one dollar. Before the period had expired, the license was annulled. It was urged on the argument that such a license was a contract and within the protection of the national Constitution. The court held the contrary. The opinion of Mr. Justice Bigelow directly meets the question. He says: "The whole argument of the counsel for the plaintiff is founded on a fallacy. A license authorising a person to retail spirituous liquors, does not create any contract between him and the government. It bears no resemblance to an act of incorporation by which, in consideration of the supposed benefit to the public, certain rights and privileges are granted by the legislature to individuals,

<sup>1</sup> 5 Gray's R. 597.

under which they embark their skill, enterprise, and capital. The statute regulating licensed houses has a very different scope and purpose. It was intended to restrain and prohibit the indiscriminate sale of certain articles deemed to be injurious to the welfare of the community. The effect of a license is merely to permit a person to carry on the trade under certain regulations, and to exempt him from the penalties provided for unlawful sales. It therefore contained none of the elements of a contract. The sum paid for it was merely nominal; and there was no agreement either express or implied that it should be irrevocable. On the contrary it is manifest that this statute, like those authorizing the licensing of theatrical exhibitions and shows, sales of fireworks and the like, was a mere police regulation intended to regulate trade, prevent injurious practices and promote the good order and welfare of the community, and liable to be modified and repealed whenever, in the judgment of the legislature, it failed to accomplish these objects."

§ 558. In *The State v. Holmes*<sup>1</sup> (N. H. 1859), the Supreme Court of New Hampshire came to exactly the same conclusion, upon precisely the same course of reasoning. Mr. Chief Justice Perley, in delivering the opinion, says: "It is an essential ingredient of a legal license that it confers no right or estate, or vested interest, but is at all times revocable at the pleasure of the party who grants it. Nor has the word any popular use which differs from the legal definition. In both the legal and the popular sense, the term license implies no right or estate conveyed or ceded, no binding contract between parties, but mere leave and liberty to be enjoyed as a matter of indulgence at the will of the party who gives the license." In another passage of the opinion, the licensee is likened to a public officer holding a position of personal trust, and liable to be deprived of his office by legislative action.

§ 559. In *The Metropolitan Board of Excise v. Barrie*<sup>2</sup> (N. Y. 1866), this subject very recently came before the Court of Appeals of New York. Under a statute passed in 1857, the defendant had received, in 1865, a license to retail

<sup>1</sup> 1 Chandler's R. 225.

<sup>2</sup> 7 Tiffany's R. 657.

spirituous liquors in New York City, which, by its terms, was to continue in force until fifty days after the third Tuesday in May, 1866, and for which a substantial fee had been paid. In April, 1866, the legislature adopted another statute regulating the sale of liquors in New York City, which provided, among other things, that after the first of May, 1866, no person should retail spirituous liquors in that city unless he had received a license therefor from the Metropolitan Board of Excise erected by the new law. Subsequent to the first of May, 1866, and before his former license would have expired by its terms, the defendant retailed spirituous liquors without having received a license from the new Board. The action was brought to recover the prescribed penalties. It was urged on behalf of the defendant that the statute of April, 1866, so far as it affected him, was inhibited by the national Constitution and was void, as it destroyed an existing contract between him and the state. The court, by an unanimous judgment, sustained the validity of the statute. Mr. Justice Wright, who delivered the opinion, after showing that the legislature has complete authority to regulate the sale of spirituous liquors, proceeds: <sup>1</sup> "It [the statute] in terms revokes licenses granted under the act of 1857, but that is no encroachment upon any right secured to the citizen as inviolable by the fundamental law. These licenses to sell liquors are not contracts between the state and the person licensed, giving the latter vested rights protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal and constitutional sense. They have neither the qualities of a contract, but are merely temporary permits to do what otherwise would be an offence against the general law. They form a portion of the internal police system of a state; and are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke, or continue them, as it may deem fit."

These cases sufficiently illustrate and sustain the proposition stated in a preceding paragraph.

<sup>1</sup> 7 Tiffany's R. 667.

### 5. *Private Corporations.*

§ 560. Without attempting any exhaustive analysis and definition, it is sufficient here to say, for purposes of illustration, that the corporations known to the American law are municipal, established for governmental purposes; or private, established for some purposes of direct private gain or advantage, although the public, as an unorganized, and not as a municipal body, may be indirectly benefited thereby. Cities, villages, and towns are examples of the former class. The latter class includes those formed purely for the transaction of business, as banking, insurance, railway and bridge companies, and the like; those which are exclusively or partially eleemosynary, as colleges, hospitals, asylums; and those which are simply religious, as church societies. All private corporations in the United States are created immediately or mediately by legislative act. Two modes are in common use in which these associations are called into legal existence. A single corporation may be authorized by a special statute which is technically known as its charter; or the legislature may pass a general law permitting any persons complying with its provisions to associate themselves and assume the corporate character. This latter method is of somewhat recent origin, and is rapidly becoming general throughout the United States.

§ 561. The question to be considered is, are the charters of private corporations — or, in other words, the acts of incorporation, whether special or general — contracts between the company and the state, the obligation of which the latter is forbidden to impair? No other matter connected with constitutional interpretation has given rise to so many decisions, state and national, and to such a fundamental difference of opinion and conflict of judgment. I say fundamental, because this conflict has, in fact, grown out of radically different conceptions of the Constitution as an organic law, and of the states as essentially sovereign or essentially subordinate. Yet I think it may be said, without any doubt as to the correctness of the statement, that, so far as the Supreme Court of the United States can establish a principle and rule of construc-

tion, all these disputes have been finally settled, and settled against the claims of state sovereignty.

§ 562. The whole subject divides itself into three heads, which are, in fact, entirely independent of each other, and which ought to be separately considered, even at the risk of some repetition. These divisions are the following :

(1.) Is the charter granted by the legislature, in its general scope and design, so far as it confers franchises upon the corporation for the accomplishment of the general purposes of its creation, a contract between the company and the state, the obligation of which the latter may not impair ?

(2.) Assuming that the preceding question be answered in the affirmative, then are the collateral stipulations which may be inserted in the charter, which are not necessary for the accomplishment of the general design of the corporation, but which may be very beneficial thereto, and may render the franchises more valuable, — are they contracts equally binding upon the state ? To illustrate : if in chartering a bank the legislature had stipulated that only a certain amount of tax should be levied upon the institution ; or, if in chartering a toll-bridge company, a provision had been inserted that no other bridge should be erected within certain distances of the one authorized by the statute, would these limitations be binding upon the state ?

(3.) Are there any implied contracts or agreements on the part of the state, growing out of the express language of charters, and of the general objects and designs for which corporations are created ?

As before remarked, these divisions are independent of each other. The first question might be answered in the affirmative, and both the others in the negative. A neglect to keep these several propositions separate and distinct has produced, and can only produce, confusion and uncertainty.

§ 563. (1.) The charter of a private corporation, whether a special statute or a general law, is, in its general scope and design, and so far as it confers franchises for the accomplishment of the general objects of the association, a contract, the obligation of which the state may not impair.

This proposition may be considered as settled ; as an established principle of our constitutional law. The number of judicial decisions in which it is expressly affirmed, or implicitly assumed, is very great. I shall not attempt to burden the memory or attention of the reader by a reference to all these cases. The judgments of the Supreme Court of the United States, and a few recent opinions of state tribunals, will sufficiently indicate the results which have been reached through a long forensic and judicial controversy.

§ 564. The question first arose in a formal manner in the leading case of *Dartmouth College v. Woodward*<sup>1</sup> (1819). The facts necessary to be stated are few. During the colonial times, the Crown of Great Britain had granted a charter incorporating Dartmouth College, specifying the number of trustees, how they were to be elected and hold their offices, their powers, and the like. The legislature of New Hampshire subsequently passed a statute modifying this charter in many important particulars, and making great changes in the organization of the institution. The case turned upon the validity of this statute. The Supreme Court examined several subordinate points before arriving at the vital one. Thus, they determined that a college is a private and not a public corporation ; that the state succeeding to the rights of the British Crown over the subject, was as much bound by the charter as though it had issued from the state legislature. The court then passed upon the nature of a charter. Chief Justice Marshall delivered the opinion, and held that a charter is a contract, the consideration on the part of the corporation being the benefits which they are supposed to confer upon the public at large. He summed up his argument as follows :<sup>2</sup> " This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the security of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Con-

<sup>1</sup> 4 Wheaton's R. 518.

<sup>2</sup> *Ibid.* 643.

stitution, and within its spirit also." Opinions were also delivered by Mr. Justice Washington and by Mr. Justice Story to the same effect. The court therefore adopted and announced the principle as the ground of their judgment — *ratio decidendi* — that a private charter is a contract between the state and the corporation. The statute of New Hampshire making changes in the organization of Dartmouth College was declared to impair the obligation of the contract, and to be absolutely void. The Dartmouth College case has always been regarded as authoritative, and has been followed by the same high tribunal in all subsequent decisions, and, with some exceptions to be noticed, by the state courts.

§ 565. In *The Providence Bank v. Billings*<sup>1</sup> (1830), the court, by Chief Justice Marshall, say:<sup>2</sup> "It has been settled that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the Constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract."

Again, the same doctrine was affirmed in the *Planters' Bank v. Sharp*<sup>3</sup> (1848). In this case it appeared that the bank had been chartered in Mississippi. The act of incorporation contained the following clauses descriptive of the general powers of the institution: The bank shall have power "to possess, receive, retain and enjoy lands, . . . goods, chattels, and effects of what kind soever, and the same to grant, alien, or dispose of for the good of the bank; also to discount notes and bills of exchange, and to make loans," etc. A statute was subsequently passed forbidding the bank to transfer any note or other evidence of debt. The Supreme Court held the latter statute void, as it impaired the obligation of a contract.

§ 566. Passing to a few recent decisions of state courts, we shall find the same doctrine affirmed with equal force and directness. In *Backus v. Lebanon*<sup>4</sup> (1840), the Supreme Court of New Hampshire declared that the charter of a turn-

<sup>1</sup> 4 Peters' R. 514.

<sup>2</sup> *Ibid.* 560.

<sup>3</sup> 6 Howard's R. 301.

<sup>4</sup> 11 New Hamp. R. 19.

pike company is a contract, and protected by the Constitution of the United States. The Supreme Court of Vermont assented to the doctrine in *Grammar-School v. Burt*<sup>1</sup> (1839). In *Michigan State Bank v. Hastings*<sup>2</sup> (1844), the Supreme Court of Michigan held that the charter of a bank is a contract, and that where such charter contains no reservation of the power to repeal, a repealing statute is void. The court say: "If there is any one question more firmly settled than another, it is that a private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation judicially declared and ascertained." In *Bruffitt v. The Great Western Railroad Company*<sup>3</sup> (1861), the Supreme Court of Illinois gave their assent to the doctrine as applied to a railway corporation. They say: "This rule has been uniformly adhered to by the Supreme Court of the United States, and is recognized by the supreme judicial tribunals of the various states of the Union as undoubted law, and it may be regarded as the settled law of the country." In *The Commonwealth v. The New Bedford Bridge Company*<sup>4</sup> (1854), the Supreme Court of Massachusetts applied the principle to the charter of a bridge company.

§ 567. In the *Matter of Oliver Lee and Company's Bank*<sup>5</sup> (1860), the Court of Appeals of New York said, by Mr. Justice Denio: "Certain principles have been established by the Federal Supreme Court, and are no longer subjects of controversy. Thus it has been adjudged that an executed grant is as fully within the constitutional protection as an executory agreement. Then the provision is not limited to dealings between individuals, but extends equally to contracts between the states and private persons; nor, in respect to contracts to which the state is a party, is it confined to such as relate to definite pecuniary obligations, or to specific real or personal property. It embraces charters and grants of corporate powers

<sup>1</sup> 11 Vermont R. 632.

<sup>2</sup> 1 Douglas' R. 225.

<sup>3</sup> 25 Illinois R. 353.

<sup>4</sup> 2 Gray's R. 339.

<sup>5</sup> 7 Smith's R. 9.



and privueges when conferred for private and pecuniary objects. And it also applies to corporations created under general laws. Such statutes are considered as propositions extended to private citizens; and when they have been accepted, and a corporation has been organized pursuant to their provisions, a contract between the state and the private adventurers is created, which is equally inviolable as the terms of a charter granted by special statute."

In *Bank of Pennsylvania v. The Commonwealth*<sup>1</sup> (1852), Mr. Justice Black, certainly no advocate of ultra national views, used the following expressive language: "That an act of incorporation is a contract between the state and the stockholders, is held for settled law by the Federal courts and by every state court in the Union. All the cases on the subject are saturated with this doctrine. It is sustained, not by a current, but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*, — that great principle which is the sheet-anchor of our jurisprudence, — can deny that it is immovably established."

§ 568. Notwithstanding the current, or, as Mr. Justice Black calls it, the torrent of authorities, a persistent attempt was made a few years since by the Supreme Court of Ohio to undo all this work, and to establish the doctrine that charters are not contracts. Certain banks had been organized in Ohio under a general statute. The legislature subsequently made some important changes in their charters. The question was raised for judicial decision, whether these latter acts of the state were valid or void. The Supreme Court of Ohio held them all valid in the cases of *De Bolt v. The Ohio Life Insurance Company*,<sup>2</sup> *Mechanics' and Traders' Bank v. De Bolt*,<sup>3</sup> *Knoup v. The Piqua Bank*,<sup>4</sup> and the *Toledo Bank v. Bond*.<sup>5</sup> In some of these cases the Ohio judges made a very elaborate argument to show that Chief Justice Marshall and all the other judges of the Supreme Court of the United States had been wrong; that a charter had never been directly decided to be a contract; that a charter is not a contract, because

<sup>1</sup> 7 Harris' R. 144.

<sup>2</sup> 1 Ohio State R. 563.

<sup>3</sup> Ibid. 591.

<sup>4</sup> Ibid. 608.

<sup>5</sup> Ibid. 622.

there is no consideration, and there are no parties until the corporation has been called into being by the very charter; that a charter is an act of the state's sovereignty conferring certain privileges which the same sovereign state may at any time withdraw. These decisions were made in 1853. Some of the cases, however, were carried to the Supreme Court of the United States, where the sophistry of the Ohio judges was brushed away, and the rule as originally laid down in *Dartmouth College v. Woodward* was affirmed.<sup>1</sup>

§ 569. (2.) It being settled that the charter itself — the grant of franchises by the state to the corporation, by means of which the latter is enabled to pursue and accomplish the general objects of its creation — is a contract, the second question remains to be considered, — are all the collateral stipulations which may have been inserted in this charter, which are not necessary to the existence and objects of the corporation, but may aid in promoting its success, and which are restrictions upon the legislative powers of the state, — are they also contracts? This question has given rise to a vast amount of judicial conflict; and although it is now settled, as I think, it was not put to rest without great discussion and much opposition of opinion. Still, the decided preponderance of authority among the state courts, and an uniform course of decision in the national Supreme Court, have pronounced an affirmative answer to this question, and have placed these collateral stipulations upon the same footing as the general grant of franchises in the charter.

§ 570. The collateral stipulations of this character which have been generally inserted in charters, may be grouped into two classes: those which limit the state's power of taxation, and those which limit the state's right of eminent domain. To illustrate: if a state should incorporate a bank with ordinary banking franchises, and should add in the charter that the rate of taxation imposed upon the institution should never exceed a certain specified amount; or if a state should incorporate a

<sup>1</sup> *Piqua Bank v. Knoup*, 16 Howard's R. 369; *Ohio Life Insurance and Trust Company v. De Bolt*, 16 Howard's R. 416; *Dodge v. Woolsey*, 18 Howard's R. 331.

toll-bridge company with the ordinary franchises necessary to enable the corporation to erect and maintain a bridge at a certain place, and to take tolls thereon, and should add a clause in the charter, declaring that no other bridge should be erected within certain distances up and down the stream; it is plain that neither of these stipulations would be necessary to the existence and the accomplishment of the objects of these respective corporations. The bank might carry on all legitimate banking business without any limitation upon the rate of taxation applicable to it; the bridge company might build and maintain their structure, and collect tolls from all who cross, although there were a dozen rival bridges. But it is plain that these and similar provisions in charters might be, and probably would be, very advantageous to the particular corporations. At the same time they would have the effect, if operative, to limit and restrain two important functions of the state government, — that of taxation, and that of eminent domain. Can a state legislature thus bind itself and all future legislatures; or, in other words, are these and similar clauses contracts between the state and the corporation, and thus within the protection of the United States Constitution? To answer this question satisfactorily, we must refer to decided cases, and especially to those in the highest court of the nation.

§ 571. In *Gordon v. The Appeal Tax Court*<sup>1</sup> (1845), the Supreme Court of the United States gave effect to a statute of Maryland restricting the legislative power of taxing particular banks. Certain banks had been incorporated. In 1821 a law was passed continuing their charters to 1845, upon condition that they would construct a certain road, and pay a school tax. This statute also declared that if any of the banks accepted and complied with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them. The stipulation was held by the court to be a contract and within the constitutional protection. A subsequent law of the state imposing a tax was adjudged invalid.

§ 572. The question was directly presented in *Woodruff v.*

<sup>1</sup> 3 Howard's R. 133.

Trapnall<sup>1</sup> (1850). The legislature of Arkansas had, in 1836, chartered a bank whose whole capital belonged to the state. One clause of the charter provided "that the bills and notes of the said institution shall be received in payment of all debts due to the State of Arkansas." In 1845 this clause was repealed. The Supreme Court of the United States held that this stipulation in the original charter constituted a contract between the state and the holders of these notes, and that the repealing statute was void as to all notes issued prior to its passage. The opinion of the court was delivered by Mr. Justice McLean, and Taney, C. J., Wayne, McKinley, and Woodbury, JJ., concurred. Nelson, Grier, Catron, and Daniel, JJ., dissented. The prevailing opinion took the broad ground that states are bound by *all* their contracts, and gave no force whatever to the claim that a state cannot bargain away its sovereign capacities and functions.

§ 573. In *The Richmond Railroad Company v. The Louisa Railroad Company*<sup>2</sup> (1851), the Supreme Court again considered the question, without directly passing upon it. The legislature of Virginia had incorporated the Richmond, Fredericksburg and Potomac Railroad Company, whose track and route ran northwardly from Richmond to the Potomac River. The charter contained a clause to the effect that the legislature would not allow any other railroad to be constructed between those places or any portion of that distance, the probable effect of which would be to diminish the number of passengers traveling on the first named road, or to compel said company to reduce the rates of fare in order to retain its passenger traffic. The legislature afterwards incorporated the Louisa Railroad Company, whose track and route ran in a general easterly and westerly direction, and, coming from the west, struck the track of the Richmond road at right angles at some distance from Richmond, crossed said track, turned and ran into that city. The two roads were, therefore, parallel for a short distance, while their general direction was at right angles, and there could be no competition as to any through travel, and none as to way traffic except for a small portion of the route. The

<sup>1</sup> 10 Howard's R. 190.

<sup>2</sup> 13 Howard's R. 71.

contention was that the latter act of incorporation impaired the obligation of the contract contained in the former. It will be noticed that the general franchises of the first road were in no way interfered with; all that could be affected was the right growing out of the collateral stipulation. Had the Supreme Court decided this stipulation to be no contract, and therefore not binding on the state, there would have been an end of the case. But the court assumed the stipulation to be a valid contract, and therefore binding upon the state, and, from a construction of the language of the acts, simply held that the second charter did not impair the obligation of the first; because it did not appear that the company formed under this second charter would interfere with the passenger traffic of the first road. This conclusion seems to be entirely correct; yet from it three able judges, McLean, Wayne, and Curtis dissented, holding both that the stipulation was a contract, and that the subsequent act of incorporation impaired its obligation.

§ 574. I now pass to some decisions of state courts involving this question. In *The Piscataqua Bridge v. The New Hampshire Bridge*<sup>1</sup> (1884), the subject came before the Supreme Court of New Hampshire. The plaintiffs had been chartered as a bridge company; and the exclusive right had been given them to erect and maintain a toll-bridge within certain limits, which bridge they had erected. The legislature subsequently incorporated the defendants, and authorized them to build a bridge over the same stream and within the prescribed limits. This latter statute made no provision for any compensation to be paid to the plaintiffs. The defendants were proceeding to erect their bridge. The plaintiffs thereupon commenced the suit to restrain this erection. In delivering the opinion of the court, Mr. Justice Parker held the following propositions: That the exclusive grant to the plaintiffs was a contract as much as the mere grant of the franchise to erect and maintain the bridge; that the legislature could not impair the obligation of this contract; that the bridge of the defendants, erected by them without paying any compensation to the plaintiffs, would be an impairing the obligation of the contract; and that, there-

<sup>1</sup> 7 New Hamp. R. 35.

fore, the erection must be restrained. In the course of his opinion the judge discussed some questions not involved in the case, but which have a general interest. He held that the legislature, under its right of eminent domain, would have had the power to authorize the second bridge upon providing for compensation to be ascertained and given to the plaintiffs for the injury to their rights, in the same manner that all or any private property may be taken for public uses upon the payment of compensation; also, that the plaintiffs' charter could not be construed as restraining the legislature from exercising its right of eminent domain upon making compensation; and he added, that, if the charter had contained such a stipulation, the restriction would be a nullity, for he was of opinion that a state could not thus bargain away its sovereign prerogatives.

§ 575. In *Brewster v. Hough*<sup>1</sup> (1839), the same question again came before the same court; and here also the opinion expressed was confessedly unnecessary to the decision. The case involved the subject of taxation. Mr. Chief Justice Parker said: "The power of taxation is essentially a power of sovereignty, or eminent domain; and it may well deserve consideration whether this power is not inherent in the people under a republican form of government, and so far inalienable that no legislature can make a contract by which it shall be surrendered, without express authority for that purpose in the Constitution." He adds: "Let it be distinctly understood that we do not intend to suggest a doubt of the right of a legislature in divers instances to make contracts which shall bind future legislatures." He then refers to the previous decision in relation to the toll-bridge, and proceeds: "But to hold that the legislature cannot make a grant whereby the property shall be exempted from public use, and to hold also that they cannot contract to exonerate the property of citizens from taxation, and thereby bind future legislatures, by no means indicates an opinion that the legislature have the right to rescind or abrogate grants of land and franchises, or contracts lawfully entered into by a preceding legislature. . . . There is a material difference between the right of a legisla-

<sup>1</sup> 10 New Hamp. R. 138.

ture to grant lands, or corporate powers, or money, and the right to grant away essential attributes of sovereignty, or rights of eminent domain. These do not seem to furnish the subject-matter of a contract."

§ 576. Again in *Backus v. Lebanon*<sup>1</sup> (1840), the same court approved of the doctrine stated in the foregoing passages, although in this instance also such an expression of opinion was unnecessary. It is evident, therefore, that in New Hampshire, although the question has not been directly presented for decision, the Supreme Court has repeatedly assumed and advocated the principle that collateral stipulations in charters which limit the legislative power of the state over taxation and the right of eminent domain, are not contracts.

§ 577. The Supreme Court of Massachusetts examined this subject at great length and with much ability, in *Boston and Lowell Railroad Company v. Salem and Lowell Railroad Company*<sup>2</sup> (1854). The plaintiffs had been incorporated in 1830 to construct and maintain a railway from Boston to Lowell. The charter contained the following clause: "No other railroad than the one hereby granted shall, within thirty years from the passage of this act, be authorized to be made leading from Boston to Lowell." The defendants' road had been authorized, without any compensation to the plaintiffs, to run between the same places. The court held this clause a contract, and binding on the legislature, although their attention was strongly directed to the argument that a legislature cannot cede away its rights of eminent domain. At the same time, the court held that the second road might be constructed, if provision had been made to pay the plaintiffs a suitable compensation for the invasion of their rights. In other words, it was held that the language of the restrictive clause did not amount to a complete renunciation of the state's rights of eminent domain.

The Supreme Court of Connecticut adopted the same doctrine in *East Hartford v. Hartford Bridge Company*<sup>3</sup> (1845).

In the case of *The Bank of the Republic v. The County of*

<sup>1</sup> 11 New Hamp. R. 19.

<sup>2</sup> 2 Gray's R. 1.

<sup>3</sup> 17 Conn. R. 78.

Hamilton<sup>1</sup> (1858), the Supreme Court of Illinois seems to lean in favor of the principle announced by the New Hampshire court, that, in incorporating a bank, the state cannot limit its powers of taxation; although it must be confessed, this conclusion, if reached at all, is reached in a very blind and halting manner.

§ 578. In Pennsylvania the question has repeatedly arisen. The first case in order is *Easton Bank v. The Commonwealth*<sup>2</sup> (1849). The bank had been incorporated, among others, under a general statute. This statute provided that these banks should be created "upon condition" that, among other things, they should pay a certain amount of tax. Subsequently the legislature raised the rate of taxation, and the contention was that the statute making this increase in the rate was void. The court held it valid, because the original law under which the banks were organized, contained no stipulation that the tax should not be changed. With this decision I entirely agree; but the court also made some observations which would imply that even had the charter contained such an express restriction, it would not have been binding.

In *Mott v. The Pennsylvania Railroad Company*<sup>3</sup> (1858), the Supreme Court of that state distinctly and emphatically took the ground that a legislature has no power to alienate any of the rights of sovereignty — such as that of taxation — so as to bind future legislatures, and that any contract purporting to have such an effect is void; that the rights of sovereignty are a trust, to be exercised for the benefit of the people, not to be abandoned or bargained away, at the discretion of their agents.

§ 579. But in the *Iron City Bank v. Pittsburg*<sup>4</sup> (1860), the same court receded from the ground taken by them in the case last cited, and held the following to be the rules of law which are authoritative throughout the country: "A grant of land or of corporate franchises by an act of legislation, is a contract between the state and the grantee, the obligation of which a subsequent legislature cannot impair. If the legislature, in

<sup>1</sup> 21 Illinois R. 58.

<sup>2</sup> 6 Casey's R. 9.

<sup>3</sup> 10 Barr's R. 442.

<sup>4</sup> 1 Wright's R. 340.



creating a corporation, prescribe a rate of taxation, and expressly release the power to impose further taxes, or do not expressly reserve the power to themselves, a subsequent tax-law does impair the obligation of the contract and is void. The evident effect of these propositions is to place the taxing power of the state government at the disposal of the contracting parties. The legislature representing the people are one of the contracting parties; the incorporators are the other. The theory is that the legislature represents the people for the purpose of making contracts as well as of making laws; that the grant of a franchise is not merely an act of legislation, but is also a contract, and that the legislature holds the taxing power, and therefore may bargain it away, precisely as they hold and may grant the power of corporate franchises." These conclusions were stated to be those of a series of decisions made by the United States Supreme Court, whose authority was followed.

§ 580. A prolonged and somewhat acrimonious discussion of the nature and effect of collateral stipulations in charters, which purport in terms to limit the legislative power, was a very prominent event in the judicial history of Ohio. In 1845 a general banking law was passed, authorizing the incorporation of banks. The 60th section of this act required the banks to pay each year six per centum of their profits to the state, and declared that such amount should "be in lieu of all taxes to which such company or the stockholders thereof on account of the stock owned therein, would otherwise be liable." Many banks were organized and went into operation. In the year 1851 a statute was passed by the legislature, having the effect to increase the rate of taxation laid upon these banks. In the same year a new constitution of Ohio was adopted, which required the rate of taxation upon banks to be made uniform with all other taxes laid upon property. Pursuant to this constitution another statute was passed in 1852 raising the rate of tax. The state officers having made attempts to collect the increased tax, suits were brought by certain banks to test the validity of the new legislation. The following cases were carried to the Supreme Court of Ohio: *De Bolt v. The Ohio Life Insurance*

and Trust Company,<sup>1</sup> *Mechanics' and Traders' Bank v. De Bolt*,<sup>2</sup> *Knoup v. The Piqua Bank*,<sup>3</sup> and *The Toledo Bank v. Bond*.<sup>4</sup> In two of these cases, as has already been mentioned, the court declared that bank charters are not contracts; but in all it held that the stipulation in regard to taxation was not binding on the state, was not a contract within the protection of the national Constitution. The reasoning which supported this conclusion was as follows: The states are absolutely sovereign so far as they have not parted with that sovereignty to the general government; they are absolutely sovereign over the subjects of taxation and eminent domain; being thus sovereign they cannot relinquish their sovereignty; one legislature cannot bind a subsequent legislature on these subjects, since the subsequent legislature as much represents the sovereign people and holds all its sovereign powers, as the former did. The court, therefore, pronounced the laws increasing the rate of taxation to be valid.

§ 581. From these decisions, as may well be supposed, an appeal was taken to the Supreme Court of the United States, which in 1858 heard and decided the case of *Piqua Bank v. Knoup*.<sup>5</sup> The opinion was delivered by Mr. Justice McLean. The court overturn all the positions of the Ohio judges; declare the charter to be a contract; pronounce the express collateral stipulations contained in it to be contracts, although they restrain the legislative power of the state; and hold the statute of 1851 increasing the tax to be void as it impaired the obligation of the contract. From this judgment three members of the court, Catron, Daniel, and Campbell dissented; Mr. Justice Campbell delivering an elaborate opinion, in which he adopted the reasoning and the conclusions of the Ohio judges.

In the year 1855 other cases from Ohio, involving the same doctrines, were considered and determined by the Supreme Court, *Dodge v. Woolsey*,<sup>6</sup> *Mechanics' and Traders' Bank v. DeBolt*,<sup>7</sup> and *Mechanics' and Traders' Bank v. Thomas*.<sup>8</sup> The

<sup>1</sup> 1 Ohio State R. 563.

<sup>2</sup> *Ibid.* 591.

<sup>3</sup> *Ibid.* 603.

<sup>4</sup> *Ibid.* 622.

<sup>5</sup> 16 Howard's R. 369.

<sup>6</sup> 18 Howard's R. 331.

<sup>7</sup> *Ibid.* 380.

<sup>8</sup> *Ibid.* 384.

principle that these collateral stipulations in charters limiting the taxing power are contracts, was again affirmed in the most emphatic manner. The court also decided that the new constitution of Ohio authorizing and directing the increased tax, did not obviate the difficulty ; holding that the people of a state in their organic capacity are as much bound by a contract made with their legislature, as the legislature itself.

§ 582. After these judgments of the national tribunal the same questions were again presented to the state judiciary in 1856, in *Matheny v. Golden*,<sup>1</sup> *The State v. Moore*,<sup>2</sup> and *Ross County Bank v. Lewis*,<sup>3</sup> in which cases the Ohio court yielded to the authority of the decisions made by the Supreme Court of the United States. But in *Sandusky City Bank v. Wilbor*<sup>4</sup> (1857), and *Skelly v. The Jefferson Bank*<sup>5</sup> (1859), the state court returned to its former position ; declared the judgments of the Supreme Court not binding upon it ; and sustained the validity of the second statute.

§ 583. This condition of resistance required another and formal utterance from the highest national tribunal for determining constitutional questions. The case of *Skelly v. The Jefferson Bank*<sup>6</sup> (1861), was reviewed by the Supreme Court of the United States ; the reasoning and conclusions adopted by them in the former cases were re-stated and re-established ; and their judgments giving a construction to the Constitution were declared to be authoritative, not only upon individuals but upon the states.

Thus the right and power of a state to bind itself by a contract which shall limit its function of taxing, may be considered as finally and forever settled as a portion of the political law of the United States.

§ 584. But the Supreme Court has very recently reiterated its views upon the compulsive efficacy of all state contracts, in *The Binghampton Bridge Case*<sup>7</sup> (1866), — a case which, if any case could, would have led the court to modify and relax its rule. In the year 1808, the legislature of New York in-

<sup>1</sup> 5 Ohio State R. 361.

<sup>2</sup> Ibid. 444.

<sup>3</sup> Ibid. 447.

<sup>4</sup> 7 Ibid. 481.

<sup>5</sup> 9 Ibid. 606.

<sup>6</sup> 1 Black's R. 436.

<sup>7</sup> 3 Wallace's R. 51.

incorporated a company to build and maintain a toll-bridge over the Chenango River, near its confluence with the Susquehanna. In a prior part of the same statute, the legislature incorporated another company to build and maintain a similar bridge over the Delaware River. In respect to this Delaware Bridge Company the statute provided as follows: "It shall not be lawful for any person or persons to erect any bridge or establish any ferry across the Delaware within two miles either above or below the bridge to be erected and maintained in pursuance of this act." Those provisions of the statute which relate to the Chenango Company, provided that such company "shall be and hereby are invested with all and singular the powers, rights, privileges, immunities, and advantages . . . which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the provisions, sections, and clauses thereof, not inconsistent with the provisions herein contained shall be and hereby are fully extended to" the Chenango Bridge Company. The latter company erected and have since maintained a toll-bridge. When this bridge was erected, there was a small hamlet at the place; the city of Binghampton now covers the spot on both sides of the Chenango River, and this bridge is utterly inadequate to the wants of its inhabitants. In 1855 the legislature of New York granted a charter to a new company authorizing them to place a bridge a few rods from the old one. This suit was brought by the Chenango Bridge Company to restrain the erection of the new structure. It will be noticed that two points were involved: did the restrictive clause in favor of the Delaware bridge in the original charter apply also to the Chenango bridge; and if so, was this clause a contract binding upon the state? The court answered both these questions in the affirmative, and held that the clause was a contract between the state and the Chenango Bridge Company; that it restrained the state from authorizing another bridge to be erected within the specified limits; and that the new charter was void as it impaired the obligation of the contract. From this decision, Chase, C. J., and Grier and Field, JJ., dissented, not denying, however, the general doctrines of the court, but insisting that, from a proper construc-

tion of the language of the charter, the Chenango Bridge Company did not acquire any rights under this restrictive clause passed in favor of the Delaware Bridge Company.

§ 585. (3.) It having been settled that if the charter contains any express collateral stipulations, they are contracts, and binding upon the state, we now inquire whether such collateral agreements will be implied in favor of the corporation, from its general nature, design, and objects. The answer is, they will not. The rule has been firmly established, both in the national and in the state courts, that the charter must be construed more strongly against the grantees; that no rights as against the state will arise under it by mere implication; that only such stipulations as are plainly and expressly favorable to the corporation, upon a reasonable construction of the charter, are to be regarded as contracts binding upon the state. These propositions are sustained by many cases. I shall only refer to two, decided by the Supreme Court of the United States, which have been regarded as leading, and which have been followed without a dissent both by the national and the state judiciary.

§ 586. In the *Providence Bank v. Billings*,<sup>1</sup> the bank had been incorporated by a charter entirely silent on the subject of taxation. At the time of incorporation, a certain rate of tax prevailed; the rate was subsequently increased; the bank resisted payment of the additional tax. The court held the subsequent statute valid, deciding that, as the charter contained no stipulations on the subject, none should be implied.

Again, in the great case of *The Charles River Bridge v. The Warren Bridge*,<sup>2</sup> the subject was examined in an exhaustive manner, and the rule was established beyond a doubt. The Charles River Bridge Company had been incorporated by the legislature of Massachusetts, with power to erect and maintain a toll-bridge. Their charter contained no restrictive clauses, and no express limitations upon the legislative action. Another company was subsequently chartered and authorized to place a free bridge at a very short distance from the former structure. The effect of this free bridge would plainly be to

<sup>1</sup> 4 Peters' R. 514.

<sup>2</sup> 11 Ibid. 420.

lessen, if not to entirely destroy, the value of the franchises held by the Charles River Bridge Company. The action was brought to restrain all proceedings under the second charter. The Supreme Court, in a most elaborate opinion by Chief Justice Taney, held that there was no contract between the state and the Charles River Bridge Company to the effect that another viaduct should not be constructed; that there being no express contract, none should be implied; and that the later charter was valid, as it did not impair the obligation of a contract. The principle of these cases has never been departed from, either by the national or the state judiciary; indeed, the tendency among many state judges has been to extend it to an unwarrantable length. The Supreme Court of the United States has very recently reaffirmed this principle of construction in *Turnpike Company v. The State*.<sup>1</sup>

The conclusions from the preceding analysis are, that charters of private corporations are contracts; that all express collateral stipulations contained in such charters are also contracts; but that no collateral agreements, limitations, and restrictions, by or upon the state, will be implied from the nature and objects of the corporation.

#### 6. *Municipal Corporations.*

§ 587. The charters of municipal corporations are not contracts, and may therefore be altered or repealed at pleasure, so far as the state legislature is not restrained by the local constitution. The law regards these public territorial bodies as agents and instruments of the state for the exercise of a portion of its governmental functions in a certain district; as clothed with a public trust analogous to that conferred upon officers; which agency or trust may be revoked, changed, lessened, or increased, whenever the legislature in its discretion shall think best.

To this principle there has been an universal assent. No case of authority, either in the national or the state courts, has thrown a doubt upon the correctness of these propositions. It is unnecessary, therefore, to make any extended reference

<sup>1</sup> 3 Wallace's R. 210.

to judicial opinions. One or two citations will suffice. In the Dartmouth College case the judges expressly excepted municipal corporations from the operation of the rule which they established.<sup>1</sup> In *East Hartford v. Hartford Bridge Company*,<sup>2</sup> the Supreme Court of the United States decided that, a town being a municipal corporation, a grant to it of a ferry privilege may be revoked. A series of cases has been determined during the last few years by the highest court of New York, in which the principle has been distinctly affirmed and applied to legislative acts modifying the charter and corporate powers of New York City. The last of these cases, *The People v. Pinkney*,<sup>3</sup> was decided in 1865.

## II. *What is the Obligation of a Contract which may not be impaired?*

§ 588. Courts, judges, and text writers have been troubled to find a satisfactory general answer to this question. One principal cause of the difficulty has been that the simple inquiry as to the nature of the obligation has almost always been complicated with the further inquiry, whether certain laws or acts impaired that obligation. If we can keep these questions separate, — if we can clearly fix and define the notion of the obligation, we shall then be prepared to determine with comparative ease whether any specified legislative acts impair it.

Another source of difficulty lies in the fact that “obligation” as here used is not a word having a technical meaning in the English common law; it is not a word of art; it does not belong to the professional vocabulary. The common law, it is true, used the word “obligation” as a technical term, but only to describe a sealed instrument of a peculiar form.

Again, “obligation” is a familiar English term, implying a duty, — what one ought to do, — resulting from mere moral sanctions. Thus, one is obliged to another, one is under an obligation to another, when a duty more or less pressing, and flowing from the moral law, rests upon him towards that other. The word, as it occurs in the Constitution, cannot be understood in this broad and comprehensive sense.

<sup>1</sup> 4 Wheaton's R. 659, 694.

<sup>2</sup> 10 Howard's R. 511.

<sup>3</sup> 5 Tiffany's R. 377.

§ 589. But if, turning away from the nomenclature of the English law, we examine that of the Roman, we shall there find the word used with a definite, technical, legal meaning; and this signification is the one to be given to the term as it appears in the Constitution. The later Roman jurists, who composed systematic treatises, and the codifiers under Justinian, separated the whole body of the private jurisprudence into three grand divisions: the law pertaining to persons; the law pertaining to things; and the law pertaining to actions. The second of these departments embraced all those rights and duties which have reference to things as their objects; and these legal rights were again subdivided into those which amounted to *dominium*, and those which were denominated *obligationes*. The former rights were analogous to our property, or ownership, in its various degrees and grades, and are termed by some modern jurists rights *in rem*, as they extend over the object of the right, and avail against all mankind. *Obligationes* were rights availing only against a particular person or persons, and called by many European writers rights *in personam*. The *obligatio* was, therefore, descriptive of a particular genus of rights; but it also had a more restricted meaning, which appears to be exactly the one intended in our Constitution. The Institutes defines the word as follows:<sup>1</sup> “*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis jura;*” which may be thus paraphrased: Obligation is the bond or chain of the law, by which we are through a legal necessity compelled to the performance of something according to the rules of our municipal law. It is further said that obligations flow from contracts, from quasi-contracts, from delicts, and from quasi-delicts.

§ 590. The point of this definition is, that “obligation,” as here used, is the bond or chain of the law; it is the compulsive energy of the municipal law, called into active force by the stipulations of a contract. To use logical terms, the law is the *cause*, the contract is the *occasion* of the obligation. In the absence of rules of the municipal law covering the case,

<sup>1</sup> Lib. 3, tit. 13, de obligationibus.



the most formal stipulations of parties would give rise to no obligation growing out of a contract, which human sanctions can reach, however strong an obligation might arise from the commands of God's law, and be enforced by His sanctions. We see this illustrated in a number of cases ; a gaming contract, an usurious contract, a contract to procure prostitution, and the like, may be concluded in the most formal terms, may receive the most deliberate assent of the parties ; but the law does not add any compulsive force and effect to these promises ; the law does not create any obligation upon the occasion of these contracts being executed.

§ 591. Much confusion has arisen upon this subject from the incorrect use of terms, and the incorrect notions set forth by writers of repute, and particularly by Sir William Blackstone, who, as Austin says, represented the average intellect and legal knowledge of his age. Blackstone often makes a distinction between rights resulting from the act and operation of the law, and rights resulting from the act of parties. Thus, in describing life-estates, he divides them into two general classes : those which flow from the act of parties, and those which result from the act and operation of the law, — such as dower and curtesy. This is all irrational and absurd. No legal right or duty whatever can proceed from any other source than the act and operation of the law. The acts of men, who are the subjects of that law, whether these acts be involuntary, as deaths or births, or voluntary, as marriages, contracts, testaments, are only the occasions which give the rules of the law an opportunity to become effective and operative in a particular case. No one, not even Blackstone, would say that the death of the ancestor was the cause of the heir's becoming owner, or that the death of the husband was the cause of the widow's becoming a dowress. These instances are plain ; but the case is not different when the act is voluntary. Two parties enter into a contract, their wills agree, their stipulations are mutual ; but neither their wills nor their stipulations create the right devolving upon one, nor the duty resting upon the other. The law, seizing hold of this union of wills, this expressed assent of the parties, adds its compulsive

energy to the personal stipulations, and creates the right on the one hand, and the duty on the other. The mere words, the mere assent, the mere consideration of a contract, are *in themselves* nothing; it is only the law which comes in and declares that the fact of such words, such assent, such consideration, shall give rise to rights and duties; it is only the law, I say, which thus creates an obligation in a contract.

§ 592. My definition of "the obligation of a contract" would therefore be as follows: First, the term is not to be restricted to "duty"; it is to be taken in its Roman sense as including "right" as well as duty; it is "*obligatio*," the binding, — the binding of two things together, namely, the right of one party and the duty of the other; which binding is done by the law. Secondly, "the obligation of a contract" is, therefore, the collective legal rights and duties which the existing law applicable to the contract raises or creates out of or from the stipulations of the parties; rights which it devolves upon one party, and corresponding duties which it lays upon the other.

§ 593. I have been thus particular in attempting to analyze and define the term "obligation of a contract," because some of our most eminent jurists have been greatly troubled by the phrase. I shall not refer to cases in which judges have examined the import of the words; their number is legion; their conflict is irreconcilable; a citation of them would unnecessarily consume time and space. A brief account of one leading case in the Supreme Court of the United States will sufficiently indicate the difficulty and the opposition of views. In *Ogden v. Saunders*<sup>1</sup> (1827), the effect of a discharge under a state insolvent law was considered. In a former case, *Sturges v. Crowninshield*,<sup>2</sup> the same court had held that such a statute, so far as it applied to preëxisting contracts, was void. Now, the indebtedness affected by the discharge had accrued subsequently to the passage of the state law. It was urged on behalf of the creditor that the state legislation still impaired the obligation of a contract. On the other hand it was claimed that, the insolvent law having been in existence at the time when

<sup>1</sup> 12 Wheaton's R. 213.

<sup>2</sup> 4 Wheaton's R. 122.

the contract was made, its provisions were to be taken as a part of the agreement ; or, to express the thought better, that the obligation of the contract was only such a compulsive or binding efficacy as the whole existing municipal law applicable thereto gave to the stipulations ; in other words, that the obligation flowing from the existing law, upon the occasion of the contract, was not absolute upon the debtor, requiring him to pay at all events, but was only qualified, requiring him to pay unless the contingencies should happen by which he might be discharged. The majority of the court adopted this view. Three judges, however, Chief Justice Marshall, and Justices Story and Duvall, were of the opinion that the obligation inheres in the very stipulations of the contract, and that, no reference having been made in express terms by the parties to the existing insolvent law, as limiting the extent of the debtor's liability, he could not take advantage of that statute. The majority of the court were plainly right ; and they established a principle of interpretation which has been generally assented to by the national and state tribunals.

§ 594. It may be considered, therefore, as settled that the obligation of a contract is not what the parties have, in terms, agreed to do or forbear ; but is the legal effect given to those agreements by the whole of the existing law applicable to such contract ; it includes the rights and duties which the whole existing law creates from the fact of such contract being made. Thus in New York, — laying out of view the recent bankrupt law passed by Congress, — if A. make his promissory note, whereby he promises to pay the sum of one hundred dollars to B. in one month after the date thereof, there are various existing rules of the law applicable to such a contract, and all conspiring to create the obligation resulting therefrom, — that is, the total sum of duties resting upon A., and the total sum of rights devolving upon B. Among these rules are the following : The general rule that A. must pay as he has promised ; that he has three additional days after the month has expired in which to pay ; that if six years elapse after the note becomes due, his liability is, in general, ended ; that by following certain steps prescribed by statute he may become abso-

lutely discharged from paying. All these various rules — and some others no less important — go to make up the sum total of A.'s legal duties and of B.'s legal rights, or, in other words, the obligation of this contract. Therefore every contract is impressed with the binding effect of the law existing at the time when it is entered into; that law creates and determines the obligation.

§ 595. This principle applies as well to those contracts which are made between a state and private persons, as to those made between individuals alone. If a state have passed any general law — like an insolvent or bankrupt act — permitting debtors to be discharged from their debts, this law has its effect in determining the obligation of contracts entered into subsequent to its passage.<sup>1</sup> In like manner if a state, in granting a charter to a private corporation, reserves to itself in that charter, or reserves to itself by a general statute applicable to all charters, the right to repeal or modify the grant, this reservation enters into and forms a part of the obligation, so that a subsequent repeal or modification is valid.<sup>2</sup> Under the influence of this rule there is hardly a state at the present day which grants private charters without reserving, in the charter or by general law, the power to repeal, modify, enlarge, or restrict the corporate powers and franchises which may be granted.

§ 596. A final and most important question arises, whether the remedy by which a contract is enforced, ever enters into and forms a part of the obligation of such contract. This question has given a vast amount of trouble to members of the bar and to courts in the practical administration of justice. It appears to me, however, that the difficulty and conflict have resulted wholly from different meanings tacitly given to the word remedy; and that the general principle is simple and plain; and that a general doctrine or rule may be arrived at which will materially aid in the resolution of all particular cases. Let us try to reach this general rule by the following analysis:

The law consists in commands addressed to moral agents.

<sup>1</sup> *Ogden v. Saunders*, 12 Wheaton's R. 213.

<sup>2</sup> *In re Oliver Lee & Co.'s Bank*, 7 Smith's (N. Y.) R. 9.

All these commands have the effect to raise legal duties devolving upon certain persons, and legal rights inhering in other persons. As the persons upon whom the legal duties devolve are free moral agents, they may perform or refuse to perform their duties. The law must, therefore, include some compulsive means ; otherwise the command would be merely the expression of a wish. All human laws, therefore, in addition to the mere command to do or to forbear, include a sanction by which such command is to be enforced. This sanction is the remedial portion of the law ; and it enters into the notion of human law as much as the command itself does.

§ 597. Now to apply this to the case of contracts. Two persons enter into a contract ; the law by its command obliges one of these parties to do the certain thing agreed upon ; the law also says to this party, If you do not perform the thing commanded, you shall be subjected to a certain kind of punishment. This latter is the sanction, and this sanction or remedy as much forms a part of the obligation of the contract as does the very thing agreed to be done. In other words, the parties, by entering into a contract, create an occasion by which the commands of the law come into play ; these commands give one party a right as against the other to have a certain thing done, and subject the other to the duty of doing that thing. But this is not all. The very same contract gives to the first party the right against the other to say, If you do not perform exactly what you agreed to do, you shall do something else by way of penalty or satisfaction ; and a corresponding alternative duty rests upon this other party to do the thing which is required by way of penalty or satisfaction. In other words, the right to the remedy is included in the notion of the obligation of a contract. Were it otherwise, the obligation would be binding only upon those parties who should voluntarily submit to it, and the law, as a compulsive and restraining force, would become a mere nullity.

### III. *What State Laws do impair the Obligation of Contracts.*

§ 598. We are now to answer the practical question, What kinds and classes of state laws do have the effect to impair the obligation of contracts? This question is one not easy to answer in its full extent. There may be some state statutes which plainly and unequivocally have the injurious effect; concerning which there is no room for argument. There may be others which as plainly and unequivocally do not have the injurious effect. Between these two extremes there are kinds and classes of laws concerning which there may be a doubt, there may be room for argument, for difference of opinion among legislators and judges. When we attempt, therefore, to lay down general principles which shall be absolutely inclusive and exclusive, — including all laws which are obnoxious to the constitutional provision, and excluding all others, — we shall find ourselves at once involved in great difficulty, a difficulty inherent in the nature of the subject, and enhanced by the conflicting character of decided cases. It is my design, however, to meet the question, and to attempt its solution. If I do not completely succeed, I shall at least be able to point out those cases which have been settled, and to indicate those respecting which there is still a doubt.

§ 599. There are some fundamental principles which are admitted by all, and it is well to fix these in the memory at the outset.

First. The Constitution forbids the states to *impair* the obligation of contracts. This word “impair” is important. It is not “destroy.” Destroying the obligation of a contract, would, of course, impair it; but impairing is not necessarily destruction; it is a word of far less forcible meaning. The obligation may be impaired, and some obligation, some binding efficacy be left. In fact, lessening, taking away from, or adding to the obligation, — that is, to the sum of legal rights and duties flowing from a contract, — would be to impair it.

Secondly. Any law thus operating upon a past contract, — that is, upon a contract entered into before the passage of the

law, — is obnoxious to the Constitution, except in the cases referred to in the next sentence.

Thirdly. If before the execution of the contract, a general law had been passed, giving the legislature the right to modify such contract ; or if, in the case of grants and charters by a state, a reservation had been made in the grant or charter itself, or in prior statutes applicable thereto, giving the legislature power to repeal or modify, a subsequent repeal or modification would not impair the obligation of the contract ; for the power thus antecedently reserved would enter into and form a part of the very obligation itself.

We are now prepared to pass to the positive side of the question ; and it is evident that all laws which can impair the obligation of a contract, must apply either directly to the terms of the agreement, or to the remedy by which it may be enforced. These cases will be considered separately.

1. *Laws which apply directly to the terms of Contracts.*

§ 600. In respect to such laws there is little difficulty. The point of contention has been, to determine whether certain transactions entered into between private persons, or between a state and private persons, were contracts. This being settled, the conclusion is irresistible that statutes modifying their terms, fall within the constitutional inhibition. It is evident that certain classes of legislative enactments would impair the obligation of contracts. In respect to private contracts between individuals, it is so plain as to require the citation of no authority to support the proposition, that all state laws operating upon past agreements, and affecting the very terms thereof ; which wholly or partially discharge one contracting party, without the consent of the other, from doing the very thing which he agreed to do ; or which add new stipulations or conditions to the engagement ; or which take away any that were incorporated into it ; or which extend or shorten the agreed time for performance ; or which render contracts illegal and void which were before legal and valid ; or which make those legal and binding which were before illegal and null ; —

all such legislative acts would impair the obligation of existing contracts affected thereby. In short, these statutes would strike at the very substance of the agreement, increasing or diminishing the aggregate of substantial rights and duties which, as we have seen, go to make up the obligation. On the contrary, such statutes, as far as they should apply to contracts executed subsequently to their passage, would not impair their obligation.

§ 601. In respect to contracts between a state and private persons, including grants and charters, it is equally plain that, where no power for such purpose is antecedently reserved, all statutes directly repealing the grant or charter, or in any way modifying its express terms, by changing the organization of a corporation, or by taking away powers, or by adding new conditions or duties, impair the obligation of this species of contracts. The cases cited in the former part of this section sufficiently illustrate the application of the rule. But it should be carefully noticed that no implied contracts arise in favor of a corporation, from the mere objects or designs of the charter; so that the modification must be either of something absolutely expressed, or of something necessarily included in what is absolutely expressed. Thus we have seen that imposing a tax on a bank is not prohibited, when the charter is silent on the subject of taxation, because no restriction upon the taxing power can be implied from the mere fact of incorporation. But on the other hand, if a bank should be incorporated by a charter silent in respect to the individual liability of the stockholders, no power being reserved to modify the charter, a subsequent act of the state legislature imposing an individual liability, would fall within the constitutional inhibition. For by the general common law, corporators are not individually liable; and the charter having been granted at a time when this rule of law existed, the rule itself would necessarily enter into and form a part of the obligation. But if the power to modify had been reserved to the state legislature, the subsequent statute of this character would not impair the obligation of a contract, as was directly held in the matter of *Oliver Lee*



and Co.'s Bank.<sup>1</sup> The Supreme Court of the United States lately decided in *Hawthorne v. Calef*,<sup>2</sup> that, when the charter of a railway company contained a clause making the property of the stockholders liable, to the amount of the stock held by them respectively, for the debts of the corporation, a subsequent repeal of this provision was void as against existing creditors, because it destroyed a contract made with them by the charter.

§ 602. It is settled, however, by a solemn judgment of the Supreme Court of the United States, that the states may exercise the right of eminent domain over corporations in the same manner and to the same extent as over individuals, that is, may take the corporate property and franchises for public use, upon paying just compensation therefor; such a proceeding on the part of a state will not impair the obligation of any contract contained in the charter. This proposition, which, as we have seen, has been maintained by several state tribunals, was finally established by the Supreme Court in *West River Bridge Co. v. Dix*.<sup>3</sup>

To this general description of statutes which apply to the very terms of contracts and thereby impair their obligation, I shall add a brief reference to the most important class of these laws, and to their effects upon the rights and duties of creditors and debtors.

§ 603. *State Insolvent Laws.* — The insolvent laws referred to are those which provide, under certain conditions and restrictions, for the absolute discharge of a debtor from his debts. Most states of the Union have statutes of this character as a part of their general scheme of legislation. We may examine the effect of such laws upon debts created before their passage. There can be no difficulty upon this point. The obligation of the contract would be not only impaired, but absolutely destroyed, the debtor being entirely released from doing what he agreed to do. This principle was established in the great case of *Sturges v. Crowningshield*,<sup>4</sup> the Supreme Court having been unanimous in the result which was reached.

<sup>1</sup> 7 Smith's R. 9.

<sup>2</sup> 2 Wallace's R. 10.

<sup>3</sup> 6 Howard's R. 507.

<sup>4</sup> 4 Wheaton's R. 122.

With this result all courts, state and national, have heartily agreed. I add, in the foot-note, a few cases in which the rule has been distinctly reaffirmed.<sup>1</sup>

§ 604. We may also examine the effect of insolvent laws upon contracts entered into subsequent to their passage. This question was presented in the great case of *Ogden v. Saunders*.<sup>2</sup> Perhaps no case was ever argued before the Supreme Court with more care, and decided with more consideration. I have already spoken of this judgment somewhat at large, and need not repeat the arguments and separate conclusions of the judges. It was held by a majority of the court that a state insolvent law, providing for a discharge of a debtor from his debts, does not impair the obligation of contracts entered into subsequent to its passage, and while it continues in force. I am not able to see any doubt as to the correctness of this decision upon principle, and it seems remarkable that two such able jurists as Marshall and Story should have dissented. At all events the rule was thus settled, and has since been universally followed.<sup>3</sup>

§ 605. Although not necessarily connected with the subject-matter of this work, it is proper to state the practical rules which have been established in reference to the effect of an insolvent discharge. Such discharge operates upon two persons or classes of persons, the debtor and his creditors; upon the debtor favorably, by relieving him from his liabilities; upon the creditors unfavorably, by destroying their claims. Now the question arises, Does the discharge of a debtor by the laws of a state in which he is domiciled, operate upon the claims of all American creditors, no matter in what state they may reside? This question is partly constitutional, and is partly referable to that department of jurisprudence which modern writers term the private international law. The fun-

<sup>1</sup> *Farmers' and Mechanics' Bank v. Smith*, 6 Wheat. R. 181. *Smith v. Mead*, 8 Conn. R. 253. *Boardman v. DeForrest*, 5 Conn. R. 1. *Roosevelt v. Cebra*, 17 Johns. R. 108. *Kimberly v. Ely*, 6 Pick. R. 451.

<sup>2</sup> 12 Wheaton's R. 213.

<sup>3</sup> *Blanchard v. Russell*, 13 Mass. R. 1. *Hemstead v. Reed*, 6 Conn. R. 480. *Betts v. Bagley*, 12 Pick. R. 572.

damental principle established by the Supreme Court is, that the state domicile or inhabitancy of the creditor is the fact which determines the validity of a state insolvent discharge as against him; or, in other words, that these discharges have no extra-territorial effect as against the creditor. There may be three cases.

§ 606. First. The creditor and the debtor may be inhabitants of the same state. Here, of course, the insolvent discharge granted in that state, destroys the creditor's claim. Being a member of the state, he is bound by its laws, and the obligation of the contract he entered into was created by those laws. This rule is so well settled, that I simply refer, in its support, to a few cases collected in the foot-note.<sup>1</sup>

§ 607. Secondly. The creditor may be an inhabitant of a different state from the one in which the debtor obtains his discharge, and the contract may not, by its express terms, have been made payable in the latter commonwealth. The creditor is not bound, against his consent, by such a discharge. His claim still subsists, and may be enforced, notwithstanding the insolvency. These were the facts in *Ogden v. Saunders*. Ogden, then an inhabitant of New York, had accepted certain bills of exchange held by Saunders, a resident of Kentucky. Ogden was subsequently discharged in New York under the insolvent law of that state. Having afterwards removed to Louisiana, he was there sued upon these bills, and set up his discharge as a defence to the action. This defence the Supreme Court finally overruled.<sup>2</sup> The same court reaffirmed the rule in *Boyle v. Zacharie*,<sup>3</sup> and *Cook v. Moffatt*.<sup>4</sup> State courts have acquiesced in this doctrine.<sup>5</sup>

§ 608. Thirdly. The courts of Massachusetts and of one or two other states, however, have endeavored to engraft an exception upon the last mentioned rule, as follows: If the con-

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. R. 358. *Norton v. Cook*, 9 Conn. R. 314. *Walsh v. Farrand*, 13 Mass. R. 19. *Pugh v. Bussell*, 2 Blackf. R. 366.

<sup>2</sup> 12 Wheaton's R. 358, 369.

<sup>3</sup> 6 Peters' R. 348, 635.

<sup>4</sup> 5 Howard's R. 295.

<sup>5</sup> *Norton v. Cook*, 9 Conn. R. 314. *Bradford v. Farrand*, 13 Mass. R. 18. *Pugh v. Bussell*, 2 Blackf. R. 366.

tract, by its express terms, was to be performed in the state where the debtor resided, and where he obtained his discharge, the creditor, though an inhabitant of another state, is bound by that discharge. This statement of the rule would make the efficacy of the discharge to depend upon the *locus* of the contract, and not upon the domicile of the creditor. The Supreme Court of Massachusetts insisted upon this view in the old case of *Blanchard v. Russell*<sup>1</sup> (1816), and later, in that of *Scribner v. Fisher*<sup>2</sup> (1854). But the Court of Appeals of New York had considered the exact question, and had arrived at an opposite conclusion in *Donelly v. Corbett*<sup>3</sup> (1852). Finally, the case of *Baldwin v. Hale*<sup>4</sup> (1863), was carried to the Supreme Court of the United States, and the exception which the Massachusetts tribunals had endeavored to establish, was overruled; the place of performance was held immaterial; the domicile of the creditor, under all circumstances, was declared to be the determining fact. After this decision, the Massachusetts court gracefully receded from its position, and in *Kelly v. Drury*<sup>5</sup> (1864), adopted the views of the national judiciary. The Supreme Court again affirmed their rule in *Gilman v. Lockwood* (1867).

## 2. *Laws which Apply Directly to the Remedy.*

§ 609. What laws, if any, which apply directly to the remedy, fall within the inhibition of the Constitution, has given rise to much judicial controversy and conflict of decision. State courts of undoubted ability have asserted and maintained the proposition, that the remedy is completely under the control of the local law. Others of no less authority have admitted that the remedy may be interfered with to such an extent as to impair the obligation of contracts, but have virtually refused to apply this doctrine to cases where any remedy has been left, although its efficacy may have been materially diminished, or a resort to it may have been arbitrarily postponed. On the other hand, the Supreme Court of the United

<sup>1</sup> 13 Mass. R. 1.

<sup>2</sup> 2 Gray's R. 43.

<sup>3</sup> 3 Selden's R. 500.

<sup>4</sup> 1 Wallace's R. 223.

<sup>5</sup> 9 Allen's R. 27.

States has, in a series of important cases, established and applied the rule, that materially abridging or postponing the existing remedy, or imposing new conditions upon it which substantially interfere with its pursuit, have the effect to impair the obligation of contracts. But it must be admitted that the state courts have shown themselves very unwilling to accept these conclusions of the national tribunal, and the reasoning upon which they were founded, and to apply them in their integrity to subsequent cases as they have arisen. I believe, however, that the obscurity which has been thrown around this subject, and the direct contradiction of judicial decision which has been so frequent, have resulted in great measure from the employment of the word "remedy" in uncertain and even in double senses; that in this, as in so many other forensic disputes, the parties have not given to the same terms the same meaning; and that by a proper analysis it is possible to arrive at a general principle which may reconcile all conflict, and be a guide in the decision of all cases.

§ 610. It was shown in a former paragraph that a remedial right is included in the very notion of the obligation of a contract; that without such a right there would be nothing imperative in the rule of law requiring parties to do what they have agreed to do. Any state statute which impairs this remedial right in the case of an existing contract, as truly and as effectually impairs the obligation as though its operation had been directed against the very terms in which the parties had expressed their compact. This would seem to be self-evident. But lawyers, judges, and text-writers have not always distinguished between this intrinsic remedial, or sanctioning right, which is additional to the primary right flowing from the very terms of the contract, and which equally with it forms a part of the obligation, and the mere modes, the mere judicial procedure by means of which this secondary right is enforced. The word "remedy" has been applied to both, to the essential remedial right which is the final object of all judicial procedure, and to the procedure itself; a denial that the latter forms any part of the obligation has been tacitly or expressly extended to the former; and the whole remedy has

thus been placed under the control of state legislatures. That this result is plainly erroneous may be established, I think, by the following analysis :

§ 611. The term remedy used in our legal nomenclature includes, as Austin clearly shows, two entirely distinct classes of objects ; (1) the secondary, sanctioning, or remedial right by which the observance of a contract is made something more than voluntary ; (2) the procedure by and through which this secondary, sanctioning right is made efficient. The first of these objects is included within the obligation ; the second is not. To express the same proposition in other language, a party may demand that substantially the same remedial right appropriate to his contract when it was entered into, shall be accorded to him when it is broken ; he cannot demand that the forms of judicial procedure which prevailed at the former time shall also be in existence at the latter. If we can ascertain, therefore, in any general way, what is necessarily embraced within the secondary, sanctioning, or remedial right which inheres in the injured party upon the breach of a contract, we shall also have ascertained what laws, by impairing that remedial right, will impair the obligation of the contract itself.

§ 612. Under our system of jurisprudence two forms of remedial right may result to the injured party upon the breach of a contract ; the one form applying to a small number only of agreements, the other being appropriate to all. The first is the right to have done exactly what the defaulting party promised to do, — the remedial right to a specific performance. The other is compensatory, or the right to be paid such an amount of pecuniary damages as shall be a compensation for the injury caused by the failure of the defaulting party to do exactly what he promised to do. Both of these species of remedial rights must be pursued by the aid of the courts. In both, the existence of the contract and of the breach must be established. These facts having been sufficiently ascertained, a decree or judicial order must be rendered, in the first case, that the defaulting party do exactly what he undertook to do, and in the second case, that the defaulting party pay the sum of money

fixed as a compensation for his delict. But the remedial right cannot stop here, else it would be a mere empty show. The judicial order addressed to the defaulting party must be enforced; in the first case, by compelling him to do the act or acts commanded to be done; in the second case, by seizing and selling so much of his property as may be necessary to pay the sum adjudged against him, if he neglects to make voluntary payment. Included within the general sanctioning, or remedial right which forms part of the obligation of every contract, are therefore the following elements, each and all necessary to its efficacy and perfection: (1) the right to bring an action against the defaulting party as soon after the breach as is permitted by the ordinary procedure of the courts; (2) the right to obtain a judgment or decree as soon as possible according to the ordinary modes of proceeding in the court where the action is pending; (3) the right to enforce this judgment as soon and as efficiently as is allowed by the same general methods of practice. State laws interfering with either of these elements, interfere with the remedial right itself, impair its efficacy, and thereby impair the obligation of the contract.

§ 613. But the modes of judicial procedure have nothing in them intrinsically connected with the remedial right. They are adopted from motives of public policy, and from a desire to promote the convenience, partly of the whole body of citizens, partly of the bench and the bar, and partly of suitors. They are therefore changed, and may be changed whenever new notions of policy become controlling, or an altered condition of society or business requires another arrangement. Among those matters which belong to procedure are the number, organization, and jurisdiction of courts; the times and places of holding courts; the forms of action and of pleading by which the claims and defences of parties shall be presented; the periods of time given in which to respond to claims and defences, and to prepare for trial, provided the length of such periods be fairly referable to the convenience of courts and suitors, and they are not mere arbitrary delays which unnecessarily hinder the creditor in the pursuit of his remedial right; the forms of trial; the nature of the evidence; the modes of

review; the time within which judgment may be enforced, provided such period be fairly referable to that general convenience of courts and suitors which lies at the basis of all established modes of practice, and be not a mere arbitrary delay which unnecessarily hinders the creditor. A change in these and such-like matters does not affect the remedial right itself, and does not impair the obligation of even existing contracts.

§ 614. To illustrate: If the courts of a state are regularly open at certain intervals of time, so that a resort to them is possible, a statute made applicable to existing agreements, and forbidding suits to be brought thereon for one, two, or three years after the breach, or permitting suits to be commenced, but forbidding any further prosecution thereof to judgment for one, two, or three years, would directly operate upon the essence of the remedial right, and not upon the forms and modes of procedure by which that right is enforced. Such a law would be exactly equivalent to a legislative act that should add one, two, or three years to the original time of performance which the parties had agreed upon. It would be entirely independent of the judicial methods over which the state has control, because those methods must still be followed when the action is allowed to proceed. In like manner if, at the time a contract was entered into, a judgment recovered thereon could be enforced as soon as obtained, a subsequent state law that should peremptorily delay the compulsive enforcement for one, two, or three years, would be equally obnoxious to the constitutional prohibition. In conclusion: The remedy embraces an essential sanctioning or remedial right, and the judicial procedure by which that right is enforced. The procedure forms no part of the obligation, and may be changed. The essential remedial right does form a part of the obligation, and may not be impaired.

§ 615. These conclusions seem to be entirely warranted and sustained by a series of cases in the Supreme Court of the United States, and, though expressed in somewhat different language from that employed by the national judiciary, to form



the very *ratio decidendi* of those cases. In *Bronson v. Kinzie*<sup>1</sup> (1843), Chief Justice Taney, while delivering the opinion of the court, stated the general rule in the following manner: "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. . . . And although the new remedy may be less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution. . . . It is difficult perhaps to draw a line that would be applicable in all cases, between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party under it, may in effect be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." He then proceeds to show that a remedial right, or a sanction by which to enforce the command of the law, is a necessary part of the obligation of a contract. Quoting a passage from Blackstone to this effect, he adds: "We have quoted the entire paragraph because it shows in a few plain words the connection of the remedy with the right. It is the part of the municipal law which protects the right

<sup>1</sup> 1 Howard's R. 311.

and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout the Union, by placing them under the protection of the Constitution of the United States. And it would ill become this court, under any circumstances, to depart from the plain meaning of words used, and to sanction a distinction between the right and the remedy which would render the provision illusive and nugatory."

It would seem to be plain that Chief Justice Taney had in mind the distinction which I have stated from Austin, between the essential remedial right, and the modes of procedure. Yet it is remarkable that many state judges have shut their eyes to his whole course of reasoning, and to the conclusions reached by that reasoning, and not a few have given far more weight to the dictum incidentally thrown into his remarks concerning the power of a state legislature to exempt property from execution, than to the principle of constitutional construction upon which the judgment of the court proceeded.

§ 616. In *McCracken v. Hayward*<sup>1</sup> (1844), Baldwin, J., while pronouncing the judgment of the court, used language as the foundation of that decision, even yet more emphatic: "In placing the obligation of a contract under the protection of the Constitution, its framers looked to the essentials of a contract more than the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all con-

<sup>1</sup> 2 Howard's R. 608, 612.

tracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law diminish the duty, or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other. Hence, any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In *Grantly's Lessee v. Ewing*<sup>1</sup> (1845), the court said: "This court held in *Bronson v. Kinzie* that a right and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the state where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee in the enforcement of his contract, and which affected its substance, impaired the obligation and could not prevail; as an act directly prohibited could not be done indirectly."

In *Curran v. Arkansas*<sup>2</sup> (1853), the court said: "The obligation of a contract, in the sense in which these words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed, that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

These several citations are not mere dicta, unnecessary to the decision of the cases in which they were uttered, but are formal statements of the very principle of constitutional law upon which the judgments of the court are based. I shall now briefly notice the application of this principle to some of

<sup>1</sup> 3 Howard's R. 707, 717.

<sup>2</sup> 15 Howard's R. 304.

the most common species of state statutes which directly apply to the remedy.

§ 617. (1.) *Deprivation of Remedies.* — If the law of a state should assume to deprive the injured party of all remedial right upon an existing contract, the legislative act would plainly impair the obligation of such contract. This doctrine is fully established. The cases cited in the foot-note will show how it has been recognized by state courts.<sup>1</sup> But if in addition to the ordinary remedial right by action for a specific performance, or for the recovery of pecuniary damages, the common law or statute had given a special, cumulative, and perhaps more summary right of redress, the state courts have held that the destruction of this special right does not impair the obligation of the contracts to which it was appropriate, if the general right by action be left in full force.<sup>2</sup> As an application of this principle, it has been held that a law abolishing distress for rent, and made applicable to existing leases, is valid.<sup>3</sup> I think it is by no means clear that these decisions do not trench upon the rule established by the Supreme Court of the United States. We will now pass to those classes of statutes which purport not to destroy, but simply to modify, an existing remedial right.

§ 618. (2.) *Statutes of Limitation.* — A statute of limitation, shortening the time within which actions may be brought, and made applicable to existing contracts, may fall within the prohibition of the Constitution, or may be entirely unobjectionable. If its effect be to prevent an action, where the right of action exists, it would not only impair but absolutely destroy the obligation, and would be void. But if it left a reasonable time within which the injured party might bring his action, although that time might be shorter than had

<sup>1</sup> *Call v. Hagger*, 8 Mass. R. 423, 429; *Mundy v. Monroe*, 1 Manning's R. 68; *Kennebec Land Co. v. Laboree*, 2 Greenl. R. 275, 293; *Society for the Propagation of the Gospel v. Wheeler*, 2 Gallis. R. 105, 141, per Story, J.

<sup>2</sup> *Stocking v. Hunt*, 3 Denio's R. 274; *Wood v. Child*, 20 Ill. R. 209; *Evans v. Montgomery*, 4 W. & S. 218.

<sup>3</sup> *Van Rensselaer v. Snyder*, 3 Kernan's R. 299; *Conkey v. Hart*, 4 Kernan's R. 22.

before existed, the remedial right would be perfect, the obligation would be unimpaired. Statutes of limitation are measures of public policy; and if the person clothed with a remedial right be left free to pursue it immediately after its inception, he is not damnified and cannot complain, if he be required to pursue it with diligence. Thus, the ordinary period within which actions may be brought upon simple contracts is six years; a state might reduce this period to three years; this legislative act would be void as to all existing contracts where the right of action had accrued more than three years, and less than six years before, for in such cases no action could thereafter be brought, and the remedial right would be gone; but the new law would be valid as to all existing contracts where the right of action had not yet accrued, or where it had accrued a year or two years before, for even in the latter cases there would be ample opportunity left within which to enforce the remedial right. These doctrines have been acknowledged by the national and state judiciary, and form part of the settled constitutional law of the land.<sup>1</sup> A few state courts, however, have shown a disposition to give a greater force and efficacy to statutes of limitation.<sup>2</sup>

§ 619. (3.) *Imprisonment for Debt.*— Upon the same principle, a statute abolishing imprisonment for debt might be made applicable to existing contracts, and would not impair their obligation. Arrest and imprisonment of the debtor, like a preliminary attachment of his goods, is clearly a part of the mere procedure; it does not enter into our notion of the essential remedial right; it does not perform the stipulations of a contract, or pay pecuniary damages for their non-performance. The assent to this particular rule seems to have been universal.<sup>3</sup>

<sup>1</sup> *Call v. Hagger*, 8 Mass. R. 423, 429; *Kennebec Co. v. Laboree*, 2 Greenl. R. 275, 298; *S. P. G. v. Wheeler*, 2 Gallis. R. 105, 141, per Story, J.; *Sturges v. Crowningshield*, 4 Wheat. R. 122, 207, per Marshall, C. J.; *Bank of Alabama v. Dalton*, 9 How. R. 522; *McElmoyne v. Cohen*, 13 Peters' R. 312.

<sup>2</sup> *Beal v. Nason*, 2 Shepley's R. 344; *Kingley v. Cousins*, 47 Maine R. 91.

<sup>3</sup> *Oriental Bank v. Freeze*, 6 Shepley's R. 109; *Mason v. Haile*, 12

§ 620. (4.) *Stay and Appraisement Laws.* — The common form of stay laws is that in which an execution or other process is forbidden to be issued for some definite period of time after the recovery of a judgment. Statutes, however, which prohibit the injured party from commencing, or from prosecuting an action for a certain definite period of time after the breach of a contract, are identical in principle with stay laws, and constitute a particular class thereof. Appraisement laws are those which require the property of a judgment debtor seized on execution to be appraised, and forbid its official sale for a price less than some determinate portion of the appraised value. As these two classes of statutes are generally found existing in connection, forming parts of the same system of state policy, they may properly be considered together. They are the most common methods by which state legislatures have assumed to interfere with the remedial rights growing out of contracts. There has been much dispute in respect to their validity. State courts have generally sustained them. I do not hesitate to say, however, that so far as they are made applicable to existing contracts, and abridge the remedial rights of the creditor, they impair the obligation, and are void. This proposition is true upon principle, and is supported by that judicial authority which is binding in matters of constitutional construction.

§ 621. The Supreme Court of the United States has had occasion to pass upon the validity of several state laws of this description, and has uniformly pronounced them void so far as they attempted to affect existing contracts. In *Bronson v. Kinzie*,<sup>1</sup> an action was brought to foreclose a mortgage given in 1838 upon lands in Illinois. At that time the holder of the mortgage was entitled, by the law of the state, to foreclose the same immediately upon a breach of the condition, and to procure the land to be sold absolutely as soon as could be done according to the practice of the courts. In 1841 the legisla-

Wheat. R. 370; *Beers v. Haughton*, 9 Peters' R. 329, 359; *Bronson v. Newberry*, 2 Dougl. R. 38; *Donnelly v. Corbett*, 3 Seld. R. 500; *Fisher v. Lacky*, 6 Blackf. R. 373.

<sup>1</sup> 1 Howard's R. 311.

ture of Illinois passed a statute providing that in sales under a decree of mortgage-foreclosure, the debtor should have a right to redeem the land within one year after the sale, by paying the purchase-money and ten per centum interest. Another statute was also passed, providing that there should be no sale of lands upon execution, or upon mortgage-foreclosure, unless such lands should first be appraised, and should be sold for at least two thirds of their appraised value. The action was brought subsequently to these statutes, and the debtor claimed that the decree should be made in accordance with this new legislation; that the sale should be subject to his right of redemption, and should not be made for a less sum than two thirds of the appraised value. The creditor claimed that the sale should be absolute and for what the land would bring. The court pronounced the statute void so far as it applied to this mortgage, and ordered an absolute decree of sale. In pronouncing the judgment of the court, Chief Justice Taney used the language quoted in § 615.

§ 622. In *McCracken v. Hayward*,<sup>1</sup> the effect of the same statute upon execution sales was examined; and it was declared void so far as it applied to a judgment recovered upon a contract existing at the time of its enactment. In addition to the passage from the opinion of Baldwin, J., quoted in § 616, the following conclusions are instructive: "The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. . . . Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied upon, to be ascertained by ap-

<sup>1</sup> 2 Howard's R. 608.

praisement, or any other mode of valuation than a public sale, affects the obligation of the contract, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent if it exists at all; it may prohibit a sale for less than the whole of the appraised value, or for three fourths, or nine tenths, as well as for two thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion in passing laws relating to the remedy which are regardless of the effect on the rights of the plaintiff."

The same doctrine was afterwards applied to similar statutes of other states in *Grantly's Lessee v. Ewing*,<sup>1</sup> and *Howard v. Bugbee*.<sup>2</sup> The state courts have, in a few instances, adopted these conclusions of the national judiciary, although they may not have accepted, in its full scope and effect, the reasoning upon which the conclusions are founded.<sup>3</sup>

§ 623. Many state courts, however, have disregarded the rules established by the supreme constitutional tribunal; they have attempted to evade the decisions by refined and technical distinctions, utterly ignoring the salutary principle upon which the decisions proceeded; or they have entirely repudiated this principle, and asserted a complete control in the state legislatures over the whole subject of remedies. Thus, in *Chadwick v. Moore*,<sup>4</sup> the Supreme Court of Pennsylvania upheld a statute which enacted that when lands are taken on execution they shall be appraised, and if they do not bring two thirds of the appraised value, further proceedings shall be stayed for one year. Chief Justice Gibson attempted to distinguish the case from that of *McCracken v. Hayward*, by asserting that in the latter, the statute of Illinois was declared void because it created an indefinite stay of execution, which might be perpetual. This assertion was entirely gratuitous, not warranted

<sup>1</sup> 3 Howard's R. 707.

<sup>2</sup> 24 Howard's R. 461.

<sup>3</sup> *Bunn v. Gorgas*, 5 Wright's R. 441; *Billmyer v. Evans*, 4 Wright's R. 324; *Cargill v. Power*, 1 Manning's R. 369; *Scoby v. Gibson*, 1 Am. Law Reg. (N. S.) 221.

<sup>4</sup> 3 W. & S. 49.



by any thing in the reasoning or the conclusions of the court. Besides, the Supreme Court of the United States had, in *Bronson v. Kinzie*, condemned with equal emphasis a law of Illinois which gave a mortgagor a year within which to redeem his land, and thus postponed the absolute title of the purchaser for a definite period. It is not the uncertainty of the time during which a creditor's remedial rights are postponed, which impairs the obligation of his contract, but the fact that they are arbitrarily postponed at all. If the creditor may be debarred from pursuing his remedy for a year after the breach of his contract, because the length of the stay is fixed and certain, then another year might as well and as legally be added to the time of original performance, for both of these modifications would produce the same final result.

§ 624. In 1861 the legislature of Pennsylvania passed a statute staying all civil process against persons in the military service of the state or of the United States, for the term of such service, and for thirty days thereafter. An act of Congress had fixed the term of service at three years. In *Breitenbach v. Bush*,<sup>1</sup> the Supreme Court held this stay law valid, because the period of time during which the stay was to last was definite, and the court considered it reasonable. In *McCormick v. Rusch*,<sup>2</sup> the Supreme Court of Iowa decided a similar statute of that state to be constitutional. In this latter case, Wright, J., entered into a very elaborate discussion of the whole question; denied that the remedy forms any part of the obligation; and insisted that states have complete control over the subject-matter. In the course of his opinion the learned judge asserts that the whole subject would have been left free from doubt and difficulty, if the attempt had not been made to include the remedy within the obligation. This is certainly true. But the subject would have been still simpler, still more free from difficulty, if the Constitution had not attempted to protect the obligation at all, but had left the contracting parties at the mercy of the states. Having placed a restriction upon the power of the states, the Constitution must be fairly construed; its intent must be observed; indirect vio-

<sup>1</sup> 8 Wright's R. 318.

<sup>2</sup> 3 Am. Law Reg. (N. S.) 93.

lations of its inhibitions are as unlawful as those which are direct.

I need hardly say, that however patriotic and laudable may have been the design of these statutes, they were plain infractions of the constitutional provision. Forbidding a suit to be brought for three years, or to be prosecuted for three years, is the same in substance as forbidding a judgment to be executed for three years; and both affect the obligation as directly and as injuriously, as adding three years to the agreed time of original performance would do. Whatever aid of this kind is given to the soldier, should be given by Congress; and I have no doubt that Congress has full power to promote enlistments by offering such an advantage to the volunteer.

§ 625. (5.) *Exemptions from Execution.* — Judgments which direct the payment of a certain sum of money, can only be enforced in a compulsory manner by seizing and selling property of the judgment debtor. To what extent this property shall be liable to seizure, is a matter of policy for each state to determine. It is plain, that if the laws of a state should relieve all of the debtor's property from this liability, the legal obligation of every contract would be gone; none but a moral obligation would be left. Exemption Laws are those which relieve all or some portion of the debtor's property from liability to seizure and sale upon execution. So far as they apply to future contracts, they only involve a question of policy; so far as they apply to existing contracts, they involve the further question of power. To illustrate: At the time a contract is entered into, all the debtor's property is liable to seizure and sale on execution, except certain enumerated articles of clothing, of household furniture, and of food. Subsequently to the execution of this agreement, but before it has been completely enforced, the state legislature enacts a general statute by which other articles of property are also exempted, such as tools of a mechanic, a team, furniture to a certain amount, a homestead, and the like. Would such a statute be valid in its application to the existing contract? Upon the principles already stated, and upon the authority of decisions made by the Supreme Court of the United States, when we look not

merely at the very facts to which these decisions referred, but to the fundamental course of reasoning without which they could not have been made, — the *ratio decidendi*, — it is plain that the state law violates the constitutional provision, that it impairs the obligation of the contract, and is void. Courts of great ability and of high authority have, however, held the contrary; and the current of state judicial decision has been strongly in favor of such retro-active enactments.

§ 626. In *Quackenboss v. Danks*<sup>1</sup> (1845), the Supreme Court of New York decided that a statute similar to that above described was void, so far as it applied to existing contracts. Mr. Justice Bronson delivered the opinion of the court, and argued that the statute virtually takes a fund which the creditor could reach by the prior law, and transfers it to the debtor; that removing all the property of the debtor from the reach of the creditor, destroys the obligation of the contract entirely; that removing a part, impairs the obligation *pro tanto*; that state legislatures have no more power to do the latter, than they have to do the former of these acts.

In *Danks v. Quackenboss*<sup>2</sup> (1848), the same case was considered by the New York Court of Appeals, and the judgment below was affirmed by an equally divided court. Four judges adopted the reasoning and conclusions of Mr. Justice Bronson, four judges thought the statute valid, and their views were presented by Mr. Justice Gardiner, as follows: The obligation may be impaired by laws which change the express terms of a contract; or which change the existing law which gives a certain force to these terms; also by laws which deny a remedy altogether, or which burden the proceedings with new conditions so as to make the remedy hardly worth pursuing; states may modify the remedy at pleasure; the partial exemption law in question does not affect the contract at all; it only acts upon the remedy, but does not take away the remedy altogether, or place any unreasonable burdens upon its pursuit; the creditor may still obtain a judgment and enforce it against such of the debtor's property as is not exempt from execution.

<sup>1</sup> 1 Denio's R. 128.

<sup>2</sup> 1 Comstock's R. 129.

In *Morse v. Gould*<sup>1</sup> (1854), the same question was again presented to the New York Court of Appeals, and the statute was declared valid. An elaborate opinion was given by Mr. Justice Denio, who followed in substance the course of reasoning before adopted by Gardiner, J. The key to his conclusions is found in the following passage: "It is admitted that a contract may be virtually impaired by a law which, without acting directly on its terms, destroys the remedy, or so embarrasses it that the rights of the creditor, under the legal remedies existing when the contract was made, are substantially defeated. With this necessary qualification, the jurisdiction of the states over the legal proceedings of their courts is supreme."

The Supreme Court of Michigan reached the same result in *Rockwell v. Hubbell*<sup>2</sup> (1846). These views were carried to an extreme, but no doubt to a logical conclusion, by a court of Kansas, in *Mede v. Hand*<sup>3</sup> (1865). Statutes requiring an appraisal and sale for not less than two thirds of the appraised value, giving the judgment debtor the right to redeem within one year after the sale, and exempting one hundred and sixty acres of land from execution altogether, were sustained and applied to a prior contract. The court took the broad ground that the obligation of a contract is ended when a judgment thereon is obtained.

§ 627. I cannot assent to the judgments quoted in the preceding paragraph. The able courts and judges who pronounced them, seem to have fallen into error. They have required that the obligation of a contract should be totally or virtually destroyed, in order that the constitutional prohibition should become operative. The Constitution itself demands no such extent of injury; it speaks of "impairing" the obligation, not of "materially impairing" it, not of "substantially defeating" it. Laws which determine what property of a judgment debtor may be seized and sold on execution, do not belong or relate to the procedure of courts; they affect the very remedial right in its most essential part; they declare to

<sup>1</sup> 1 Kernan's R. 281.

<sup>2</sup> 2 Douglas' R. 197.

<sup>3</sup> 5 Am. Law Reg. (N. S.) 82.

what extent the contracting party shall respond to his undertaking. Exempting all a debtor's property would confessedly *destroy* the obligation, for it would remove the only fund from which a compensation can be obtained; exempting a part of a debtor's property, in that it would diminish this fund and would render the security more precarious, would as plainly *impair* the obligation of all existing contracts.

A very late judgment of the Supreme Court of the United States seems to support these views, and to be entirely irreconcilable with the reasoning and conclusions adopted by the New York court. A statute of the State of Maine had incorporated a certain railway company; the shares of the stockholders were made liable for the debts of the corporation; in case of a deficiency of corporate property liable to be seized on execution, the individual property of a shareholder, to the amount of his stock, was made liable to be seized on execution issued upon a judgment recovered against the corporation. This statute was afterwards repealed. It will be noticed that the original charter designated the property liable to be seized on execution against the company; the repealing statute withdrew a portion of this property, or, in other words, exempted a portion of this property from execution, although all the property owned by the corporation was still left liable to seizure and sale. In *Hawthorne v. Calef*<sup>1</sup> (1864), the validity of this repealing statute was denied. Mr. Justice Nelson said, while delivering the opinion of the court:<sup>2</sup> "There is another view of the case which we think equally conclusive. This view rests upon a principle decided in *Bronson v. Kinzie*, and the several subsequent cases of this class. . . . Applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditor to the extent of his stock. The creditor had this security when the debt was contracted with the company, over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company." This

<sup>1</sup> 2 Wallace's R. 10.

<sup>2</sup> *Ibid.* 23.

decision, and this reasoning of the court cover the general case under discussion. If all the property of a debtor was liable to execution when the contract was entered into, then the creditor had this security of the entire property. Removing a portion of this property from its liability to execution, does not merely modify the remedy of the creditor in respect to the property thus removed, but absolutely destroys it, and therefore impairs the whole obligation of the contract.

## CHAPTER V.

### THE EXECUTIVE POWERS OF THE UNITED STATES GOVERNMENT.

§ 628. IN considering the amount and nature of the authority committed by the people of the United States to the national government, we are now brought to an examination of the powers and functions of the Executive department. The provisions of the Constitution which specially concern this department are grouped in Article II., as follows: Section I. declares that "The executive power shall be vested in a President of the United States of America," and proceeds to describe the manner of choosing the President and Vice-President; the eligibility of persons to those offices; the terms of office; and the proceedings in case of the death, removal, or other disability of the President. Section II. provides that, "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: But the Congress may by law vest the appointment

of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Section III. is as follows: "He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

Section IV. provides, "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Section I., § 8, is in these words: "Before he enter on the execution of his office, he shall take the following oath or affirmation: I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

§ 629. It is evident that these several grants of power to the President are not arranged in the Constitution according to any plan or scheme of order. Some of them are so entirely ministerial or formal, that no time or space need be taken up with their consideration. In this class are the power to require an opinion in writing from the heads of departments, the power to call extraordinary sessions of Congress, or of either house thereof, the power to adjourn Congress in one emergency, and the power to issue commissions to all officers of the United States. Disregarding, therefore, the order in which the powers of the President are arranged in the second article of the Constitution, I shall treat of the more important in the following manner:



First. The general nature of the Executive department and of the Executive functions.

Secondly. The power by which the instruments and means for discharging almost all other executive functions are created, or the power to appoint officers.

Thirdly. The general, sweeping, and inclusive executive power to take care that the laws shall be faithfully executed.

Then, taking up the special functions, which are to a greater or less degree independent of the legislature, I shall consider,

Fourthly. The power to control and manage the external relations of the country, and many of the internal relations, through the means of treaties, and of diplomatic communications with foreign governments.

Fifthly. The pardoning power.

Sixthly. The power to give information to Congress, and to recommend measures to their consideration.

Seventhly. The powers of commander-in-chief, or the military and war powers; and

Lastly. The responsibility of the President, and his liability to an impeachment.

## SECTION I.

### THE GENERAL NATURE OF THE EXECUTIVE DEPARTMENT AND OF THE EXECUTIVE FUNCTIONS.

§ 630. The Constitution declares that the Executive power shall be vested in a President of the United States. The meaning of this clause is that he is the head of that department; that all its powers and functions immediately or mediately centre in him, and that he and he alone is ultimately responsible for their due execution. Certainly it was never contemplated by the Constitution that he alone was to perform unaided all the enormous detail of executive duties which fall to this department. These must of necessity be carried on by a vast retinue of subordinate officers, of various grades and functions; but all these officers represent the Chief Magistrate.

In fact, then, the Executive department includes the President as its head, as the embodiment of Executive power, and the inferior ministerial officers, — the cabinet, the foreign ministers, the revenue agents, the postal agents, the marshals, the law agents, and the like, — who are but representatives of, and answerable to, the Chief Magistrate. He acts through them, they are his means and instruments for performing Executive functions.

§ 631. It should be carefully borne in mind that the President is an independent, co-ordinate department of the government. The grand theory of the Constitution makes him a co-equal in the tri-partite organization. He draws his power from the same source as the national legislature and judiciary; he is answerable to neither; his discretion is as absolute as that of any legislator, and more so than that of any judge; no other branch of the government may rightfully interfere with him in the exercise of that discretion; he can only be reached by an impeachment, when he has used his discretion, not merely in a mistaken or even arbitrary manner, but in a corrupt or criminal manner.

§ 632. It is true that Congress is authorized by Article I., Section VIII., § 18, "to make all laws which shall be necessary and proper for carrying into execution all powers vested by this Constitution in the government of the United States, or in any department or officer thereof." But this clause does not enable Congress to enlarge the capacity with which the President is independently clothed by the organic law; much less does it enable Congress to restrict, limit, or abridge that capacity. This grant to the legislature is intended as ancillary merely; it empowers that body to aid the President in the discharge of his executive functions; it may create opportunities or occasions for calling those functions into play. But Congress may not directly or indirectly establish another Executive than the President, either with complete or with partial powers and capacities. "The Executive power shall be vested in a President." "He shall take care that the laws be faithfully executed." The language is not that he shall execute the laws; and Congress may therefore create subordinate

offices, and may define the duties of the officers in the most positive manner, so that they shall be clothed with no discretion. Such officers would actually execute the laws; and the great mass of positive laws have been thus executed from the commencement of the government; and this arrangement appears to be absolutely necessary. But still the President must be left free to "take care that the laws be faithfully executed;" that is, free to take care that the subordinate officers, who are charged with express, positive duties, in fact perform those duties faithfully. Any attempt to clothe a subordinate official agent, whether of a high or of a low grade, with express, positive duties which he must fulfil to the letter, or with duties, in the fulfilment of which he has a discretion, and to remove him entirely from the control of the President, to make him entirely independent of the Chief Magistrate, — any such attempt would be directly contrary both to the letter and to the spirit of the Constitution. It would be so far a vesting the Executive power in a person other than the President; and it would so far deprive the President of the express power conferred upon him to "take care that the laws be faithfully executed." Great as is the legislative function, the people of the United States have never authorized their Congress to construct a new Constitution.

§ 633. The powers conferred upon the President are largely, almost entirely, political; and his acts, by which those powers are exercised, are equally political, as much so as the act of a legislator in voting for or against a proposed statute. Being thus political, they can rarely be brought within the scope of a judicial examination in the ordinary administration of justice. Whenever thus examined, it is not the direct personal act of the President which is submitted to this scrutiny, but the act of some inferior ministerial officer, who is in theory, and perhaps in practice, the direct instrument for exercising the executive function. Laws of Congress are always examinable, and are frequently examined by the courts, and pronounced valid or void. But even here the examination cannot take place until some attempt has been made to carry the law into execution, so that some individual rights are affected. When the

law is thus brought before the court having jurisdiction, that tribunal pronounces directly upon the question whether there be any such law; whether there be any thing which the executive department can execute. Thus the powers of the President may be questioned in an incidental manner; those of his subordinates may be questioned in a direct manner; for these powers, in each particular case, must be based upon some affirmative constitutional grant, or upon some existing law made pursuant to the Constitution, which may be, or ought to be, enforced.

§ 634. But it should be noticed that even here the courts, whatever authority they may possess over subordinate ministerial officers, do not, and cannot, examine the nature and character of the President's acts, outside of the question whether there be a valid law, or an affirmative constitutional grant, as the foundation and support of those acts; and do not, and cannot, directly examine the President's personal acts, or restrain or control him in the exercise of his official functions, even though it be alleged that there is no valid law, or affirmative constitutional grant, to authorize and support such act. These principles were clearly set forth by Chief Justice Marshall in *Marbury v. Madison*,<sup>1</sup> and were affirmed and established by the Supreme Court of the United States in the *State of Mississippi v. Andrew Johnson*.<sup>2</sup>

Thus, if we could suppose the case that all existing statutes of Congress should be entirely repealed, and the country should be left absolutely without any national legislation, it is plain that a large portion of the powers and duties of the President, and all the powers and duties of his subordinates, would immediately become suspended, and would only be revived when Congress should again resume its work of creating positive law. In other words, although the capacity of the President to discharge his entire range of functions always exists, and is uncontrolled and uncontrollable by Congress or by the courts, yet the opportunities and occasions to exert these powers, and therefore the extent and number of the powers themselves, do and must rest largely upon the prior exercise

<sup>1</sup> 1 Cranch's R. 137.

<sup>2</sup> 4 Wallace's R. 475

of the legislative will. This is peculiarly true of that great mass of subordinate civil officers whose creation is within the authority of Congress. These persons are appointed to fill official positions ; the very offices themselves are established to carry out and enforce certain special laws, or classes of laws ; the functions and duties are defined ; there is no discretion allowed ; the number and scope of these functions and duties depend, therefore, upon the legislative act which lies back of all this mode of execution. But while in great measure the opportunities and occasions for the President to use powers, and the number and scope of those powers themselves, do in fact, and must by any theory, largely depend upon a prior exercise of the legislative will, this is not completely and absolutely true. And this leads me to consider the nature of the President's executive attributes and functions in their totality, and the classes into which they necessarily separate themselves.

§ 635. There are three independent classes of executive attributes and functions, all resulting from the provisions of the national Constitution.

First. As the President is an independent, co-ordinate branch of the government, and as the Constitution contains some express affirmative grants of power to him alone, there are and must be certain attributes and functions which have no connection with proper legislation ; which are completely conferred by the terms of the organic law ; which do not depend upon any prior statutes for the opportunities or occasions of their exercise, nor for their number and scope ; which would still exist and might still be carried into operation, if Congress should blot out all its laws, or should attempt to restrain and limit the President, in his official proceedings, from calling them into action. Such suppositions as the latter are, of course, violent, and perhaps absurd ; but they serve to draw the line of demarcation between the various kinds and classes of executive attributes, and to point out the relations between the departments of the general government.

§ 636. In respect to the executive powers which fall within this class, the President is clothed with an absolute, unlimited

discretion. The acts done by virtue of these powers are completely political. The subjects themselves, over which the powers extend, do not fall within the province of Congressional legislation; and that body cannot by any laws enlarge or diminish the President's capacity; it can do nothing more than pass such laws, if it thinks proper, as shall aid the Chief Magistrate in the execution of these powers. Nor may the courts interfere, and assume to regulate the President's conduct. His great responsibility is to the people; and the sole official check is his liability to an impeachment.

By far the most important function of this class is that which relates to the management of foreign affairs, and includes the power to make treaties with the consent of the Senate, and the power to receive and hold communication with foreign ministers. Of far less moment are the powers to furnish information to Congress, to recommend measures, to convene either or both houses, and to adjourn the Congress in a certain emergency.

No doubt these independent and absolute attributes of the President would be barren of any great results without the co-operation of the other departments, and especially of the legislature; but it is certainly possible to suppose that they should exist and be exercised separately. By thus supposing a case where one department should act entirely alone, we are able to clear up and fix our conceptions of their respective independent and mutually dependent functions while they act together.

§ 637. Second. The second class of executive attributes and functions are those which depend upon some prior statute of Congress for the opportunities and occasions upon which they may be exercised. The constitutional grants of power are affirmative and express; but they relate to such a class of acts, that Congress must furnish the subject-matter upon which the power may be exerted. But even here, the legislature has exhausted its authority when it has furnished the occasion or opportunity. The executive attributes having been brought into play, the discretion of the President is as absolute and unlimited as in the cases embraced within the former class. His power

is full and complete, and belongs to him by the express terms of the organic law; the legislature may pass laws proper and necessary to aid him, if needed, in the execution of this power, but may not lawfully increase or abridge it. The same discretion also extends to those subordinates who may be employed to exercise in fact this class of executive functions. Indeed their acts are, in such cases, his acts; their discretion is his discretion. The only manner in which Congress may curtail the number and scope of these attributes and functions held by the President, is by diminishing or removing the opportunities and occasions upon which they are called into operation.

The most important of these functions are those belonging to the commander-in-chief, the pardoning power, and the appointing power. The President's capacity as commander-in-chief certainly remains dormant until Congress has raised an army, has constructed a navy, or has provided for calling forth the militia; his pardoning power cannot be exercised until Congress has defined crimes and apportioned punishments; his power to appoint officers cannot be exerted until Congress has created the offices which may be filled.

§ 638. Third. The third class of executive attributes and functions are those which depend upon some prior laws of Congress not only for the opportunities and occasions of their exercise, but for their number, character, and scope. Over this class the legislature has a more complete control. It passes laws which must be executed. No discretion need be left in the President. Indeed, the actual execution may be intrusted to designated subordinate officers, and these officers may be directed in the plainest and most positive terms what steps to take, what duties to perform. In such cases the only duty of the President is to "take care that the laws be faithfully executed." This class evidently embraces by far the greater part of the Congressional legislation, and of the executive functions based thereon.

§ 639. We have thus seen, that with respect to the functions included in the first and second classes, the President is clothed with a complete discretion. Many of the acts done by virtue thereof, he does himself; they are the result of his own

volition. Many of these acts, however, are done by subordinate officers, who to this extent represent the Chief Magistrate. But in respect to the functions included in the third class, the President may be deprived of all discretion; special officers may be charged by Congress with the duty of enforcing its measures. Such officers are subject to a double liability. As the laws of Congress indicate the exact scope of their public duties, an injured party may obtain redress against them through the courts for any transgression of those duties; and a party, whom the laws have clothed with a positive right, may invoke the aid of a court having jurisdiction, to compel them to perform their duties. These ministerial officers must also be responsible to the President for the manner in which they carry out the mandates of Congress, or else he would be deprived of the power given him by the Constitution to "take care that the laws be faithfully executed." The only method by which this responsibility can be made effective, is a removal of the delinquent subordinate from his office.

§ 640. The views set forth in the foregoing paragraphs were very clearly stated and maintained by Chief Justice Marshall in the great case of *Marbury v. Madison*.<sup>1</sup> He says: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to

<sup>1</sup> 1 Cranch's R. 137, 165.



the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties ; when he is directed peremptorily to perform certain acts ; when the rights of individuals are dependent on the performance of those acts ; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others. The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather, to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

§ 641. It is evident from the foregoing analysis, that the plan of government adopted in the Constitution is very different from that which is practically operative in Great Britain. So far as the President has executive functions directly conferred upon him, he is independent of Congress. It was never intended that the legislature should draw to itself the duty of administering the laws which it makes. There is danger, it cannot be doubted, lest the Congress should trench upon the attributes of the Executive. This is not done by interfering with the class of powers first above stated (§§ 635, 636). The subject-matter of these powers lies so plainly beyond the sphere of the legislature, that any assertion of jurisdiction over them is hardly to be anticipated. The tendency, if it exist at all, is to control the President in the exercise of his functions of the second class (§ 637) ; or to commit those of the third class (§ 638), to subordinates, and to limit and restrain the President in any practical exercise over those subordinates, of his power to "take care that the laws be faithfully executed." I need hardly say that such legislation is

opposed to the spirit of the organic law ; and if it became general, would break down the independence of the Executive, and practically reduce the government to a single political branch.

## SECTION II.

### THE POWER TO APPOINT OFFICERS.

§ 642. We are now prepared to take up and consider the various classes of executive powers in the order already mentioned. I examine, in the first place, the Power of Appointment, because the officers, in all their various subordinate grades, are the means and instruments by which the laws shall be executed, and the general functions and duties of the department performed. The provisions of the Constitution on this subject are as follows : “ He [the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

Certain officers are provided for in the Constitution, and the method of their choice or election is also strictly defined in that instrument. These are the President and Vice-President, the Presidential Electors, the Members of the Senate and of the House of Representatives. Article I., Sections II. and III., give exclusive power to each house of Congress to choose its own officers. Article III., Section I., declares that the judicial department shall consist of one Supreme Court, and of such inferior courts as Congress shall from time to time ordain and establish. The number of the judges is left entirely to the Congress ; but the article requires that all the

judges when appointed shall hold their offices during good behavior. It will be seen, therefore, that a very few offices and officers are entirely beyond the control of either Congress or President ; that a very few are entirely under the control of the respective houses of Congress ; that the judges when appointed, — as long as the courts shall exist, — are beyond the control of Congress or President, because they cannot be removed during good behavior, nor can their salaries be diminished during their terms of office.

§ 643. In regard to the great mass of subordinate officers, Congress and the President have correlative powers ; neither can act without the other. Congress has full power to create the office by law ; to fix the compensation ; to allot the powers and duties ; to prescribe general qualifications or conditions, such as that security shall be given for a faithful discharge of duties, and perhaps personal qualifications, such as loyalty ; and, I have no doubt, to regulate the term of office. This done, the power of Congress ceases ; they can do no direct act towards filling the office. Such act is the sole, independent function of the President, by and with the consent of the Senate ; except that in the case of “ inferior officers,” the appointment may be vested by law in the President alone, or in the courts, or in the heads of departments, without requiring the Senate’s consent. What class of officers come within the designation of “ inferior,” has never been established, and cannot be determined with any precision and certainty. The practical construction which Congress has placed upon the clause, confines its operation to those public agents whose duties are quite subordinate.

§ 644. When the Constitution was first submitted to the people for adoption, many persons of great ability and experience, as well as many others who were only demagogues, attacked the proposed scheme with vigor and persistence. These attacks were largely directed against the plan for an Executive ; and among others of his powers which were objected to, none was opposed more bitterly than the power of appointment. As a clear statement of these objections, I will quote from the celebrated letter of Luther Martin to the

Maryland Legislature. Mr. Martin was certainly one of the ablest lawyers of his time, and had been a member of the Constitutional Convention. He says:<sup>1</sup> "To that part of this article which gives the President a right to nominate, and with the consent of the Senate, appoint all the officers civil and military of the United States, there was considerable opposition. It was said that the person who nominates, will always in reality appoint, and that this was giving the President a power and influence which, together with the other powers bestowed upon him, would place him above all restraint and control. In fine, it was urged that the President as here constituted, was a King in every thing but the name; that though he was to be chosen for a limited time, yet, at the expiration of that time, if he is not re-elected, it will depend entirely upon his own moderation whether he will resign that authority with which he has once been invested; that from his having the appointment of all varieties of officers in every part of the civil department, who will be very numerous in themselves and their connections, relations, friends, and dependents, he will have a formidable host devoted to his interests, and ready to support his ambitious views. . . . It was further observed that the only appearance of responsibility in the President, which the system holds out to our view, is the provision for impeachment; but that when we reflect that he cannot be impeached but in the House of Representatives, and that the members of this house are rendered dependent upon, and unduly under the influence of, the President, by being appointable to offices of which he has the sole nomination, so that without his favor and approbation they cannot obtain them, there is little reason to believe that a majority will ever concur in impeaching the President, let his conduct be ever so reprehensible; especially, too, as the final event of that impeachment will depend upon a different body, and the members of the House of Representatives will be certain, should the decision be ultimately in favor of the President, to become thereby the objects of his displeasure, and to bar to themselves every avenue to the emoluments of government.

<sup>1</sup> *Elliott's Debates*, Vol. 1, p. 379.

Should he, contrary to probability, be impeached, he is afterwards to be tried and adjudged by the Senate, and without the concurrence of two thirds of the members who shall be present, he cannot be convicted. This Senate being constituted a privy council to the President, it is probable many of its leading and influential members may have advised and concurred in the very measures for which he may be impeached."

In a letter addressed to the Legislature of Virginia, Edmund Randolph hoped that the proposed constitution would be amended by taking from the President "the power of nominating to the judiciary offices, or of filling up the vacancies which may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session."<sup>1</sup>

These quotations will serve to illustrate the objections of statesmen to the proposed constitution; the violent and absurd vituperations of mere haranguers like Patrick Henry, need not be cited. How great an element of truth, and how great of error, is contained in these critical predictions, each student of our history must decide for himself.

§ 645. To these arguments the friends of the Constitution replied, that as the President is responsible for the due execution of the laws, he should choose the subordinate agents by whom the execution was to be in fact performed; that in every form of civil society some confidence must be placed in human nature; that many of the objections brought forward would equally apply to every kind of government; that experience has shown that when the responsibility of appointment rests upon one person alone, he is much more likely to be affected by the weight of the duty, and to make good nominations, than where the responsibility is divided among several, so that no one can feel it to rest wholly upon himself; that the chances of having good men nominated by the President, are, therefore, much greater than would be were the officers to be chosen by Congress, or some other deliberative body; finally, that the President would always be held in check, for the ratification of the Senate was indispensable.

<sup>1</sup> *Elliott's Debates*, Vol. 1, p. 491.

§ 646. I shall now consider the nature and extent of the power itself. The President is to nominate, and with the advice and consent of the Senate, appoint officers. At the very outset of the government, an attempt was made by a few persons to give such a construction to this language as would make the Senate the body to take the initiative. It was urged that, as the Senate was to advise as well as to consent, they could only advise a course of action prior to that action; that we consent to a thing after we know it is attempted to be done, but we advise a thing prior to any attempt; that the only way possible for the Senate to advise as well as to consent to the appointment of officers, was for them to suggest names to the President, from which he might choose a person whose nomination would be communicated to the Senate, whereupon that body would proceed to indicate its consent to that particular appointment by ratifying it. This course of argument, though plainly having some grammatical correctness, was not convincing. It was evident that such a course would virtually make the Senate the sole appointing power; that the President would only be the registrar of their decrees. And, besides, the nomination of a person is not his appointment; it is only the initial step towards that result. The appointment takes place when the President has issued the officer's commission, which can only be done after the action of the Senate. It may, therefore, be said with sufficient accuracy, that the Senate does advise the appointment as well as consent to it. This construction has been established by a uniform practice; and the appointing power is actually exercised by the President in nominating a person to the Senate, and by the Senate in ratifying or rejecting such nomination.

Still, it must be conceded that, as the practice has been thus settled, the clause of the Constitution receives no greater efficacy from the presence of the word advise; to all intents and purposes the Senate simply consents to the action of the President, and to the appointment he makes. Indeed, the President goes elsewhere for advice. But the real power of the Senate has not been abridged by the received interpretation put upon the organic law. When there has been a difference between

them and the Executive, they have not been slow to use their prerogative, and to use it successfully. In fact, they may, perhaps, be able to go beyond the function specially committed to them, and may, in truth, dictate a nomination to the President.

§ 647. I am now brought to the important question, Can the President remove from office? It will be noticed that the Constitution is absolutely silent upon this subject. Whatever power of removal there may be, must, therefore, be implied as a reasonable consequence and concomitant of some other powers expressly granted. That officers may be removed, is conceded on all hands; by whom the removal is to be made, under the Constitution, is a question not yet definitely settled. There are only three possible alternatives. Either the President may remove, upon his own volition, independent of the Senate, or of Congress; or the President, by and with the advice and consent of the Senate, may remove, independent of Congress; or the Congress has complete control of the subject, and may establish such rules respecting removals as it thinks proper. If the authority belongs to the President, it is inferred from and included in some more general functions granted to the Executive; if the President and the Senate possess the power, it is because they together hold the power of appointment. In either case this special prerogative would be conferred by the Constitution as absolutely as though expressed in positive terms; it could not be abridged by any legislation. If the whole subject is within the control of Congress, this results from their general power to create offices, and to pass laws necessary and proper to carry into execution the attributes and functions granted to other departments. No case has ever yet arisen in which a judicial construction was given to the Constitution in this respect. *Ex parte Hennen*,<sup>1</sup> which is sometimes referred to, simply determined the authority of a district judge to remove the clerk of the district court, under a statute of Congress which gave to the judge the right to appoint, but was silent in reference to removal. The legislative and executive construction has, however, until very

<sup>1</sup> 13 Peters' R. 230.

recently, been uniform from the commencement of the government, and has declared in favor of the sole authority of the President.

§ 648. The question was first raised and discussed in Congress in the year 1789, when a bill for establishing an executive department, to be called the Department of Foreign Affairs, was pending before the House of Representatives. The first clause, after stating the title of the officer, and recapitulating his duties, had these words, "to be removable from office by the President of the United States." A motion was made to strike out this clause, and the discussion turned upon the power of removal under the Constitution. It seems to have been conceded that the power resides, either absolutely in the President, or in the President and Senate conjointly. The supporters of the motion generally advocated the latter construction. They urged that the removal from office was a part of the appointing power; that as the power to appoint was conferred in distinct terms upon the President, by and with the consent of the Senate, it was to be considered by necessary implication that the power to remove resided in the same hands; that under the Constitution the President could remove with the consent of the Senate, and that any attempt by statute to confer the power on the President alone, was unconstitutional; that to clothe the President with this power was in the highest degree impolitic, as he might as readily use it for partisan and personal ends, as for the public good. Many gentlemen of great ability and influence advocated these views.

§ 649. It was answered, that the statute would not, indeed, make the President's power any greater than it was before, but that the clause in question was eminently proper as a construction put upon the Constitution by the legislature; that as the executive power was, in general terms, vested in the President, he possesses all such power to a full extent except where it is limited in the same instrument; that the appointment and removal of officers is essentially an executive act, and that, had the Constitution been entirely silent upon the subject, the President would have had full and sole power to make all ap-



pointments; that his authority to appoint was limited in express terms, but his authority to remove was not limited at all, and Congress had no power to interpolate a limitation upon the general executive functions, which the Constitution does not expressly, or by any necessary implication, contain. To these considerations it was added, that without the power to remove, the President would be shorn of half his independent authority; that he would be under a responsibility for the proper execution of the laws, without any means of enforcing his will upon officers who might, perhaps, be incompetent or untrustworthy. In short, that it would often happen that an officer should be removed for a cause not sufficient for an impeachment, and that the President is the proper person to judge of the nature and sufficiency of such causes. Mr. Madison was the principal champion of the President's absolute power, and his arguments and influence doubtless carried with him a majority of the House. In answering the objection that such a power in the President might easily become dangerous, that he might remove officers from mere partisan and personal ends, he said: "The danger, then, consists merely in this, — the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such an abuse of his power, and the restraints that operate to prevent it? In the first place he will be impeachable by this house, before the Senate, for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust." The motion to strike out the clause was rejected by a vote of thirty-four to twenty.<sup>1</sup>

§ 650. The grounds thus assumed by a majority of the House, at the very commencement of our present Union, have been assented to by every administration since, and have furnished a rule for the guidance of every President, of whatever school of political opinion, from Washington to the present Executive. The only difference between these Chief Magistrates has been in respect to the causes which they have

<sup>1</sup> *Elliott's Debates*, Vol. 1, pp. 350-404.

deemed sufficient to warrant a removal; whether they have required causes personal with the officer, affecting his integrity or his capacity, or whether they have relied on causes that were only partisan and political. It must be admitted that, in the progress of time, the kinds of removal which the opponents of the President's power described as so dangerous, and which Mr. Madison declared would be sufficient ground for impeachment, have become by far the most common; and that the power is now claimed on the one hand, and denied on the other, chiefly for the opportunity which it gives to punish political opponents and reward political friends.

§ 651. Let us briefly examine these two theories of construction, and the arguments which support them. One gives the function to the President, the other to the President and Senate; both deny that Congress may pass any law restraining the capacity. Neither claims to find the authority in any express grants of the Constitution. Each infers the authority from other grants in that instrument; and its advocates attempt to strengthen their position by describing the superior advantages and greater conveniences which would result, or do result, from their interpretation, and the corresponding dangers and evils which would result, or do result, from the other interpretation. While the reasoning is of this character, it can hardly be said that the arguments on either side are absolutely convincing. Still, as between these two theories, I am of opinion that the one which has received the sanction of long practice, is supported by considerations of the greater weight.

§ 652. It would seem to be plain that, as the President is charged with the duty to "take care that the laws be faithfully executed," he should be able to remove any officer for a good cause affecting that officer personally, for incapacity to perform his duties, neglect in the performance, breach of trust, or for any other maladministration. But where so much is conceded, there does not seem to be any limit to the power of the President to remove. The Constitution is silent; it makes no distinction between removing for good cause, and for bad cause, and for no cause. The President's authority to remove

at all is inferred from the nature of removal in itself, not from the nature of the cause or occasion upon which the power may be exercised. To be sure the nature of the cause of removal has often been appealed to as illustrative of the expediency, or even necessity, that this function should be confided to the President ; but a removal, because the President so wished, is just as much an executive act, as a removal because the officer was thoroughly incompetent or utterly dishonest. This argument is strengthened by another consideration. There are some officers, and those generally of the very highest importance, whose relations to the President are such, that his power over them should plainly be absolute. They are his personal agents, perhaps his advisers, but certainly his immediate organs, by which he accomplishes most of his official acts in respect to matters in which he has the largest discretion. These are the heads of departments, and though, perhaps, to a less extent, foreign ministers. The President should be able to remove a head of either department without any regard to that person's capacity or integrity, and for no other cause than his own wish. So true is this, that the Senate has long adopted a practice to confirm the appointments made by a President to his cabinet, although the persons appointed may have been distasteful to the Senators. But there is certainly no constitutional power to remove this class of officers at pleasure, which does not equally apply to all other classes. To sum up : The interpretation of the Constitution which gives the authority in question to the President and Senate is finally based upon the notion that appointing and removing are correlative in their nature, and the person or persons who appoint must necessarily be charged with the power to remove. The interpretation which gives the authority to the President is finally based upon the notion that removal is an executive act, and that the unlimited power in him is necessary in order that he may "take care that the laws be faithfully executed." The latter considerations seem to be the more weighty of the two.

§ 653. But there is a third alternative. It may be assumed that the Constitution has left the whole subject in doubt ; that

an interpretation which should give the absolute power of removal either to the President, or to the President and Senate, would be overstrained; that neither of the theories already considered can be supported by any just construction of the organic law. Then the whole matter is left under the control of Congress. That body may create offices, and must create all to which the power of appointment applies. As an incident to the power of creation, the authority to fix the terms of office plainly exists, except in those very few instances where the Constitution has spoken. In thus prescribing the duration of an official term, Congress may either place a definite limit of time, or may make that limit uncertain, conditional, depending upon the action of some other person or persons authorized to act. Thus the legislature may regulate the duration of office, and therein the power of removal, and may confer that power upon the President alone, or upon the President and the Senate conjointly. In this manner some officers may be placed by law under the complete control of the Chief Magistrate; others may be left to the disposition of the dual appointing power. It may be that this theory will be accepted, and become the practical guide in the administration of public affairs.

§ 654. But another question has arisen, which is sometimes regarded as wholly independent of the one just discussed. It involves the extent of the President's power under the following clause: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The question is whether the President may, during the recess, create a vacancy by the removal of an incumbent, and then proceed to fill that vacancy by appointing a successor whose commission is to last until the close of the next session of the Senate. In other words, the question is not so much that of removal, as that of appointment. So far as the practice of various administrations has gone, it has recognized the existence of the power. It is evident also, that once admit this construction of the Constitution to be correct, the check upon the President held by the Senate will be in a

great measure destroyed. If he finds that the Senate are opposed to him in the matter of appointments, and that it is morally certain his nominations will be rejected, he may wait until the adjournment of that body, and then make removals and fill the consequent vacancies. The persons commissioned would be certain to hold their offices to the close of the succeeding session.

§ 655. Still, if we grant the general power of the President to make removals, I see no escape from the construction which has heretofore been adopted in practice. The power to fill vacancies during the recess, by appointments which shall last to the close of the next session, extends, by the express terms of the Constitution, only to those which happen during a recess. All which happen during a session, must be filled during the session, or they cannot be filled at all, and the nomination must be confirmed by the Senate. If language can express any thought, it is clear that a vacancy must not have commenced during a session and have extended into the recess, but must have commenced during the recess. There is, therefore, a plain check upon removals by the President during a session, for he cannot fill vacancies thus created, without consulting the Senate.

§ 656. The objections to the power of the President to fill such vacancies as he has himself caused during a recess by removal of a former incumbent, are based upon two positions; first, that he has no power to remove at all; secondly, that granting his power to remove, he can only fill such vacancies as "happen" during a recess. It has been urged that the word "happen" necessarily implies something accidental, some casualty; that it is not synonymous with the word "occur"; that the President has not power, therefore, to fill all vacancies which may occur during a recess, but only such as are really accidental, or fortuitous, such as those caused by death, or resignation, and the like, which are causes entirely beyond the control of the President. It is urged that a vacancy cannot, with any propriety, be said to "happen," which was created by the deliberate act of the President. This argument is strengthened by the consideration already alluded

to, that the contrary construction would partially enable the Chief Magistrate to dispense with the Senate, and to nullify a most important constitutional check.

§ 657. The objection to this method of reasoning is, that it is too refined, too etymological. The organic law should not be interpreted in this grammatical manner. Again, it is conceded that the President must remove during a recess, for a cause affecting the officer's capacity or integrity, and that a vacancy thus created must be filled. In conceding so much, the whole case is given up. The breach of trust, the neglect of duty may be considered sufficiently fortuitous, so that the term "happen" can properly be applied to them. But these facts do not create the vacancy; that vacancy as much results from the deliberate, intentional act of the President, as though he removed a most able and faithful officer on purely partisan grounds. The Constitution does not recognize any ulterior causes of the vacancies; they must "happen"; and if a vacancy happens from the removal of an incumbent for any ground, the same must be true of a removal for all grounds. In conclusion, it appears evident that, the President's general power to make removals being admitted, his other power to fill all vacancies caused by such removals during a recess, cannot be successfully opposed. Those who would deny the latter authority must go to the bottom of the whole matter, and contest the power to remove at all.

§ 658. I cannot leave this branch of the executive functions without a few remarks which do not strictly belong to constitutional law, but relate rather to administrative policy. Most of the objections brought forward by the original opponents of the Constitution, have proved to be utterly without foundation, or else have been recognized as benefits. The fears expressed in regard to the appointing power of the President have been more than realized; not, perhaps, in the exact direction apprehended, but in another and far worse direction. Congress and the courts have not been corrupted; but the attempt has been made, during a large portion of our political history, and with an alarming success, to corrupt the electors themselves, the people, as the source of all power. Appointment to office has

come to be universally regarded as the reward due for mere partisan services, removal from office as the penalty justly incurred by a partisan opposition. This method of administering public affairs prevails throughout the nation and the states. No one thing has done so much to debauch the politics of this country; to drive good men from the active management of parties; to create the mercenary, trading, professional politician, and to throw the entire control of the political machinery into his hands. Whatever good Jefferson may have done to the cause of liberty and free government, he more than neutralized by the example he set of making removals and appointments as mere punishments and rewards for party opposition and support. This example has found ready imitators. Jackson enlarged its scope and operation, and every President has continued the demoralizing practice. I need not describe the iniquitous results, they are known to all. Passing by the necessary consequence that the public business is negligently and dishonestly performed, the evil influences upon the people themselves are far more destructive. The discharge of official duties in a manner most advantageous to the nation, is a secondary matter. The office holder sees that the administration of the ministerial functions committed to him, is a thing of no comparative importance; in fact, the most perfect administration will not secure him in his position. Above these ministerial functions, which in theory he is appointed to perform, stands the higher and more responsible one of managing party concerns, of packing conventions, of procuring nominations, of marshalling voters, of constructing platforms, of manufacturing a public opinion. In short the office holders throughout the country have become a vast organization, a most efficient instrument for promoting party measures and success.

§ 659. I am confident that this evil cannot be remedied until we return to the methods of Washington and the elder Adams; until we accept as a practical guide, the declaration of Madison, that the appointment of an unfit person, or the removal of a meritorious one, is an impeachable offence. Some officers, the personal advisers of the President, those who directly represent and act for him, whose functions, like his own,

are discretionary, should of course be changed with each Chief Magistrate. But the great mass of ministerial officers, whose duties are not political, should be allowed to hold during good behavior, or at least, should not be subject to removal by every incoming administration.

§ 660. The present system is certainly not absolutely essential to a free country and electoral institutions. The elections in England are contested with at least as much vigor and interest as those with us; party spirit runs as high; disturbances are much more common; the sums expended by candidates are vastly larger than any similar expenditures in this country. Yet no government, whatever be its opinions and its policy, would for a moment think of displacing the office holders which it found in service. The members of the Cabinet, those who are directly responsible for all legislative and executive measures, are of course changed, but the subordinates of every grade hold during good behavior. We are accustomed to reproach the English politics with the extent of its corruption; we point to the open and almost universal bribery of electors; we comment upon the immense sums paid out by candidates; we contrast all this with our own comparative freedom from such practices. I believe, however, that the American mode of corruption is infinitely worse than the British, as it directly tends to destroy all independence of thought and opinion. The persistent attempt to change the convictions of the people, not by an appeal to their better judgments, but by the tremendous pressure exerted through an organized band of office holders, appears to be far more immoral than the system of direct pecuniary bribery.

§ 661. It may be asked whether there is any remedy for the evil. No mere alteration in the interpretation put upon the Constitution, no mere legislation of Congress will work a cure. The disease lies deeper, and will surely appear whatever be the form of the law. President and Senate can as easily appoint and remove for partisan purposes as the President alone. The remedy must be found in the people. Public opinion must be awakened; and when this mighty power is aroused, and is acting in the true direction, its effects will be seen at



once among office holders and office seekers, among Presidents and Legislatures. When the convictions of the nation are completely changed, the evil will have disappeared.

In March, 1867, Congress passed a statute which distinctly repudiated the construction which has heretofore been given to the Constitution. This act emphatically denies the President's power to remove from office; whether it asserts that the power resides in the President and Senate by the terms of the organic law, or whether it claims that Congress has complete control of the subject, does not distinctly appear. The important sections are three. The first declares in substance that no removal made by the President shall be valid unless consented to by the Senate, and this provision is extended to the heads of departments. The second recognizes the necessity of removals for good cause during a recess, but only permits the President to suspend the officer in such case, until the next session of the Senate, who shall then pass upon the propriety of the suspension. The third section limits the power of the President to fill vacancies which happen during a recess, by restricting his authority to those caused by death or by resignation. Of the validity of this statute I do not purpose to speak; the preceding discussion will indicate the questions which may arise concerning it.

### SECTION III.

#### THE POWER AND DUTY OF THE PRESIDENT TO TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED.

§ 662. I need not repeat the observations made in Section I. The Constitution vests in the President the sole executive power; it authorizes and requires him to take care that the laws are faithfully executed. His duties consist, as we have seen, partly in executing the provisions of the Constitution, in which he is independent of legislative control; and partly in taking care that the laws passed under and by virtue of the Constitution are executed. In exercising the latter function a greater or less degree of discretion may be left to him by the

legislative act. These degrees may be arranged as follows: The statute may intrust to him the whole execution, so that whatever is done must issue from him not only in theory, but in fact; or the statute may authorize the creation of new offices, leave the appointment of the officers to the President, and prescribe the exact duties which they, when appointed, are to undertake and perform; or the statute may create new duties, prescribe their methods of performance, and intrust their execution to officers already in existence, who were appointed for some other or different purposes. In the first case the President has the whole power of execution in his own hands; in the second case he must take the initiative by appointing the officers, who, when appointed, have the whole power of execution in their own hands; in the third case he has no function whatever except that of taking care that the laws are faithfully executed.

§ 663. We are met, however, by the question, Whether in those forms of legislative enactment in which the President is clothed with a discretion, in which he is charged with the duty of taking the initiative, in which he is required, not only to take care that the laws be faithfully executed, but to execute them in whole or in part, — whether in these cases he may determine for himself what are the laws; whether he may refuse to execute a certain statute or a certain decree of the national courts, on the ground that, while having the outward form of law, the statute or decree is not in fact law, but is void. Were our government modelled exactly after that of Great Britain, this question could not arise; whatever Parliament may ordain, must have the compulsive efficacy of law. But our written national Constitution, lying back of all departments of the government, creating them and defining their functions, renders it possible for any or all of them to exceed their legitimate powers; such excess will be absolutely void; the statute directing it will be no law, however formal and regular its manner of enactment may have been. May the President judge of this character, and refuse to execute all laws which he deems unconstitutional and void?

§ 664. I have already discussed this question in its more

general statement in *Part Second*, and shall not here repeat the arguments and authorities therein relied upon. I shall only add some reasons peculiar to the President. The Chief Magistrate has the express power of objecting to a proposed statute by means of his veto. Armed with this weapon, he may oppose the passage of any act which he deems unconstitutional or even inexpedient. In most cases his objections will have power to defeat the measure ; but he may be overruled by a vote of two thirds of the Congress. When this is done, or when the statute receives his assent, it certainly has the form of law, and the presumption must unquestionably be that it is valid. No one would contend that the President may now refuse to execute this statute on the ground that, in his opinion, it is inexpedient or impolitic. This would be to give him the dispensing power which was so long claimed by the British crown, and so vigorously resisted by the English people. The legislative function is given to Congress ; and if the statute be within the grants of the Constitution, and be passed according to the forms required by that Constitution, the President, aside from his power to accord or withhold his consent, has no responsibility for or control over its mere policy or expediency. Every writer on the public law, and every practical statesman, will concede the correctness of this position.

§ 665. But the conclusion thus reached is entirely independent of the further inquiry whether the President may still judge of the validity of the law on constitutional grounds. As a general rule, applicable in a great majority of cases, he cannot thus exercise an independent judgment. This opinion has been maintained by most American publicists and statesmen, although its correctness has been denied by political writers of no small reputation and ability. The arguments of those who assert the President's absolute power to pronounce upon the validity of a law, are based on two provisions of the Constitution. He is to take care that the laws are faithfully executed. It is said that he must only execute the *laws*, and not those legislative acts which have a legal semblance merely, but are void. An unconstitutional statute is no more a law

than though it had never been passed, and the President has no power whatever to execute this nullity. Again: the President is compelled to take the following oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." It is said this oath imposes on the President a personal and peculiar responsibility; that he is to be guided by his own judgment, by his own conviction of what is lawful, and not by the judgments and convictions of any other persons.

§ 666. These arguments, though not without a certain degree of plausibility, are of little weight. They either prove too much, or they beg the whole question. The senators and representatives, the members of state legislatures, and all executive and judicial officers of the states and of the nation, are also required to take an oath to support the Constitution. The President's oath is but an amplification of this; it enters into more detail, but does not add another compulsive clause. The solemn promise in particulars "to preserve, protect and defend the Constitution," does not imply more than the equally solemn promise in generals "to support" it. The former is no more binding upon the President's conscience, than is the latter upon that of every ministerial, legislative, and judicial officer: the sanction of the former does not more rigidly restrain the President in the discharge of his high public duties, than does the sanction of the latter hold all other officers to a strict accountability in the performance of their special functions. If the President, therefore, receives from the terms of his oath a power to judge independently as to the validity of a statute, to the same extent and for the same reason, every legislative, executive, and judicial officer of the states and of the nation, acquires the same power to construe and interpret the organic law for himself. Indeed the instances have not been wanting where subordinate officials have asserted their claim to this authority. Should such a practice become general, anarchy would immediately take the place of a well ordered government.

§ 667. When it is said that the President is only bound to execute the *laws*, and not void statutes, and that he must therefore decide for himself, and refuse to enforce those enactments which he deems to be unconstitutional, this is assuming the very point in dispute. The question really is, are the laws in controversy valid or void; and giving him the power to decide this question is to make him the sole dispenser of statutes; it is to introduce immediate confusion into the whole machinery of government; it is to set the Executive against the Legislature, or against the Judiciary. Of course, if the law is void, it is not to be executed; this is conceded. But who is to determine this question? It can only be the Judiciary; and their decision, as long as it stands unreversed, is final and compulsive upon the President. The statute having passed through the prescribed forms of legislation, is to be taken as presumptively valid; it certainly carries with it the *prima facie* character of legality, and until declared a nullity by the proper courts, should be treated as binding, and should be faithfully executed. In fact, there are many legislative enactments where the President must take the initiative, and commence to execute, or they will remain a dead letter; he must move, or no one else can, and thus no opportunity can arise for a judicial decision upon their validity. If the President may determine for himself, and refuse to execute, his action would be final; no person affected by such statutes could establish any rights thereunder. Another large class of laws, however, can be set in motion by private persons or subordinate officers, and thus their legality may be presented to the judicial tribunals for discussion and judgment.

§ 668. To the general rule stated in the foregoing paragraphs, there are, I think, two important exceptions. A statute may be passed of such a form and character as to be addressed directly to the President; it assumes to regulate his official action; no private person and no subordinate officer is affected by its provisions. If the Chief Magistrate enforces this law, no question as to its validity can be raised, no opportunity can be given to deny the power of the legislature. It is only by a refusal to execute such a statute that the Presi-

dent can possibly create an issue between himself and Congress; so long as he continues to carry out its mandates, it must be taken as legal. In such a case the President, unless he chooses to acquiesce, may plainly exercise an independent judgment, and act upon his own separate convictions. To illustrate: So long as the Executive obeys the recent act of Congress in relation to removals from office, and appointments thereto, the statute must be taken as valid; no officer removed or appointed can complain, for his rights have not been impaired. The law, therefore, must stand unquestioned, unless the President should disregard its commands and proceed to remove from office without consulting the Senate.

Again: it is possible to conceive the case that Congress should pass a statute which was plainly opposed to the very letter of the Constitution; concerning which there could be no doubt or difference of opinion; which was, in fact, an act of palpable usurpation. Should the legislature ever attempt to transgress their authority in this manner, the general rule which I have stated as a guide to the Chief Magistrate, could not apply. Under such exceptional circumstances, should they ever arise, he must interpose his prerogative; he must "preserve, protect, and defend the Constitution."

#### SECTION IV.

##### THE POWER OF THE PRESIDENT TO MANAGE THE FOREIGN AND INTERNATIONAL RELATIONS OF THE UNITED STATES.

§ 669. This general power is contained in the following special grants: "He shall receive ambassadors and other public ministers" accredited from foreign governments. "He shall nominate, and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls." "He shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." "All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state

shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

All foreign relations are thus confided exclusively to the President, or to him in connection with the Senate. Congress as such has no voice in, or control over, these matters, except the secondary power or duty of passing laws in certain instances to carry out the provisions of treaties.

§ 670. Of the unlimited extent and transcendent importance of this function thus confided to the Executive, either alone or in connection with the Senate, there can be no doubt. When we reflect on the results for good or evil, flowing from the condition of international relations, results which must be felt by the nation in all their internal affairs, we can judge of the responsibility which rests upon the Chief Magistrate personally, by virtue of these powers.

The function, as a whole, is divided into two distinct branches: the power of intercourse, intercommunication, and negotiation, through the means of resident or special ministers; and the power of entering into formal and binding international compacts, which must be compulsive on all departments of the government, and which are made, by the express terms of the Constitution, the supreme law of the land. I shall consider these two branches separately, the latter being much the more important.

§ 671. The President is the sole organ of communication between our own and all other governments. Foreign ministers and ambassadors are accredited to him; to him they present their credentials and pay their formal official visits. The communications which they make, and the negotiations which they conduct, are, in fact, made and conducted to and with the Secretary of State, but only as that officer is the direct and personal organ of the President. All replies of the Secretary are supposed to be inspired by the Chief Magistrate, and he may, and doubtless often does, take an actual and leading part in the negotiation. Our own ministers are nominated by the President. When appointed they communicate alone with the Executive through the State Department. Instructions are sent to them, despatches forwarded, demands made, claims in-

sisted on, principles adopted and enforced, as the President deems proper. How far he will actually interfere with the Secretary of State, and how far leave that officer to the exercise of his own discretion, must depend upon his own sense of duty and propriety, and the completeness of his own convictions.

§ 672. Over all these proceedings the Congress has absolutely no control. The correspondence and negotiations may be, and generally are, conducted secretly; and although it is customary for the President to communicate despatches to the legislature, this is never done until after their transmission, and, if necessary, they may be indefinitely withheld when the President deems that the public interests require it. Congress may pass resolves in relation to questions of an international character; but these can only have a certain moral weight; they have no legal effect; they cannot bind the Executive. The necessity for this is evident. Negotiations generally require a certain degree of secrecy; one mind and will must always be more efficient in such matters than a large deliberative assembly. The President has thus intrusted to him a most momentous power, and one which he cannot entirely delegate. Our foreign ministers must undoubtedly use their own judgment and discretion within narrow limits, but in all important matters, they receive definite and positive instructions from home. The magnitude of this function may be easily illustrated. The President cannot declare war; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative; and that step once taken, the challenge cannot be refused. How easily might the Executive have plunged us into a war with Great Britain by a single despatch in answer to the demands of the British Cabinet made in relation to the affair of the *Trent*. How easily might he have provoked a condition of active hostilities with France by the form and character of the reclamations made in regard to the occupation of Mexico.



I repeat that the Executive Department, by means of this branch of its power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power, it is untrammelled by any other department of the government; no other influence than a moral one can control or curb it; its acts are political, and its responsibility is only political.

§ 673. But the other branch of this executive function — the treaty-making power — is even more important. The language by which this authority is conferred and described, is peculiar. The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided that two thirds of the Senators present concur. All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. The President must, of course, take the initiative in making all treaties. Congress, as such, has nothing to say in the matter. As a treaty is necessarily the result of negotiation, and as such negotiation is exclusively within the province of the President, the Senate having not the least authority to communicate with a foreign government, it is absolutely impossible for that body to dictate a treaty, or to force the Chief Magistrate into any particular line of action. He must negotiate the treaty, make all the stipulations, determine all the subject-matter, and then submit the perfected convention to the Senate for ratification or rejection. They must take his finished work and approve or disapprove.

§ 674. But there is another principle of the utmost moment, involving conclusions of far-reaching importance. The Constitution places no express limits whatever upon the subjects, conditions, or contents of treaties. The President shall have power to make treaties. Now, the subjects to which these international compacts may legitimately refer, are innumerable; the stipulations they may legitimately contain, are equally varied, dependent upon numberless changes of circumstances and relations. They may affect most vitally the interests of the nation as a whole, or the private and personal interests of individuals. They may be the results of success-

ful war or of negotiation, by which territory is added ; or of unsuccessful war or of negotiation, by which territory is ceded. They may regulate navigation, the import and export of goods, the imposition of duties, the rights of aliens, the tenure of property. Congress, having no power over them, cannot abrogate or modify them. In general, therefore, the President, with the consent of the Senate, may enter into any species of treaty known in the intercourse of nations, any species known to the international law. The genus "treaties" includes all the usual kinds and sorts.

§ 675. While the President's function is in general so unrestricted, and although the Constitution places no express limits upon its exercise, there is plainly an implied limitation. I have no doubt that a treaty may be made which cuts off the authority of Congress to adopt certain *particular* means and measures by which they might have otherwise exercised some of their general powers. The convention by which certain reciprocal privileges of trade were established between the United States and the Canadas ; that by which certain tonnage duties and other commercial imposts are abandoned by the United States and France ; that by which a certain local jurisdiction in peculiar cases is given to some foreign officials resident here, are illustrations of international compacts having this restraining effect. But I think it is equally certain that a treaty would be a mere nullity which should attempt to deprive Congress, or the Judiciary, or the President, of any general powers which are granted to them by the Constitution. The President cannot, by a treaty, change the form of government, or abridge the general functions created by the organic law. That a treaty may add particular functions and attributes not expressly conferred or described in the Constitution, cannot be doubted ; indeed, almost every such convention must have this effect in a greater or less degree. Note, also, that all treaties made by authority of the United States are, equally with the Constitution and the laws of Congress passed under it, the supreme law of the land, and are binding upon, and superior to, state authority, whether that be expressed in state constitutions or state laws.

§ 676. Let us inquire in what manner treaties operate ; whether they are compulsive by and of themselves, or whether they require a statute of Congress to make them effective ? The language of the Constitution would seem to be explicit on this point ; but the Supreme Court has given the authoritative rule. Some treaties are so worded that, by their very terms, they apply directly to the subject-matter. They do not stipulate for any thing to be done in the future ; their provisions are not promissory ; but they declare that a certain thing, state, condition, or right does thereby exist. Other treaties are wholly or partly executory ; they agree that a certain thing shall be done. In regard to the first class, they are of themselves law ; binding as such upon all public officers, and upon all private persons. In regard to the second class, they are, as such, binding only upon the government, and require legislative or executive acts, as the case may be, to render them operative. As there is no possible manner of forcing Congress to pass a law carrying out the provisions of such a merely promissory convention, the only remedy which the other high contracting party would have, for the neglect or refusal of the legislature to perform its stipulated duty, would be to treat the neglect or refusal as a breach of the treaty, and a good cause of war. That it would be sufficient ground for war, according to the settled rules of international law, cannot for a moment be doubted.

§ 677. In *Foster v. Neilson*,<sup>1</sup> a case growing out of the treaty by which Louisiana was ceded to the United States, the foregoing principles were established. Chief Justice Marshall says, as the very *ratio decidendi* : “ A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra-territorial ; but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature,

<sup>1</sup> 2 Peters' R. 253, 314.

whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department ; and the legislature must execute the contract before it can become a rule for the courts."

§ 678. One modification of this language is required. No doubt, when either of the parties to the treaty engages to perform a particular act, the convention addresses itself to the political departments of the government. But it is only when the act stipulated to be done, is legislative under the Constitution, that Congress must execute the contract ; when the act is executive in its nature, the President must execute the contract. One illustration will suffice to explain this distinction. If a treaty should be made between the United States and Great Britain, having for its object the more complete suppression of the slave-trade, each of the high contracting parties might undertake to keep a squadron of armed vessels on the coast of Africa, to search and seize slavers ; and it might also be agreed that a mixed commission, or court, of both Englishmen and Americans, should be appointed to sit in the regions infested with slavers, and to adjudicate upon the vessels seized under the treaty. This convention would evidently address itself to the political departments ; from its mere language no private rights or duties could arise and be enforced by the courts. But it would address itself partly to Congress and partly to the President. The latter might, on his own motion, despatch and maintain a naval squadron on the coasts of Africa ; for the disposition of the navy is left entirely to him as Commander-in-Chief. But the provision in reference to a mixed court or commission would address itself to both departments. Congress alone could create the new office, and provide for the payment of salaries ; the President alone could nominate a person to fill the office when created. No private individual, no public officer, no foreign power, could legally compel either department to do what was agreed to be done. The only remedy of Great Britain, in case of refusal, would be war. We see, therefore, that the President, through his treaty-

making function, may so bind the Congress, that their act of neglect or refusal to comply with the compact, may give rise to the dread penalty of war. He may so bind the legislature, that they cannot free themselves from the obligation, except by declaring war against the other contracting nation ; all their attempts to throw off the compulsive efficacy of the treaty, less stringent than this, would be utterly null and void.

§ 679. In conclusion, I shall add a few remarks upon the scope and extent of this executive function of regulating foreign relations, and its influence and effect upon the general powers of the national government. There is here, as I believe, a mine of power which has been almost unworked, a mine rich in beneficent and most efficacious results. The President may, and must, manage the foreign relations ; he may, in the manner prescribed, enter into treaties. To these executive attributes must be added the legislative authority to pass all laws which may be necessary and proper to aid the President in exercising these functions. From this combination there result particular powers in the national government commensurate with the needs of every possible related occasion. We have been too much accustomed to look at the particular grants contained in the Constitution, in order to ascertain what the government may do. But here is a most ample and comprehensive grant. The government not only may, but must, preserve its foreign relations ; it not only may, but must, use all such means as shall prevent just causes of war against us by foreign powers. Its international relations are unlimited in number and extent ; they affect to a greater or less degree the internal and domestic relations ; many of the measures which are necessary to preserve and control them, must act entirely within the national territory, and directly upon private persons or rights. So far as those external relations affect the internal, and so far as the measures appropriate in exercising the function of controlling the external relations act within the interior, and upon private persons and rights, just so far has the government all the power under the Constitution which the exigencies of any occasion can demand. Where the act is legislative in its nature, the Congress may legislate ; where the act is executive in its nature, the President may execute.

§ 680. A few examples will serve to illustrate this proposition. In the absence of all express grants to Congress to define and punish offences against the law of nations, or even to define and punish any crimes, there could be no doubt of the complete authority of the national legislature to pass neutrality laws, and all other statutes of the same general class. Fitting out armed vessels in aid of one belligerent, foreign enlistments within our territory, armed expeditions organized against friendly states, would, if permitted, if not repressed, endanger our peaceful relations with the injured nations. These relations require that causes of war should be removed or prevented; the President has ample power, so far as his mere executive functions go; Congress may aid those executive functions by any means and measures which are conducive to the end proposed.

But Congress may, in aid of this function of the President, pass laws which are addressed directly to the separate states, and which control the acts of their governments. The states have no international *status*; but they may, through their governments, do such acts as endanger the foreign relations of the nation: for these acts the government is responsible to the foreign power, and cannot evade the responsibility by asserting its want of control over the state. As the responsibility rests upon it, the power must belong to it. Congress has acted upon this view of its legislative functions, by passing a statute permitting the United States courts to issue the writ of Habeas Corpus in order to inquire into the cause of restraint of any alien, where restrained for an act done by him under the authority of his own government. Thus a prisoner may be removed from the jurisdiction of the state, and transferred to that of the United States. This law was passed upon an occasion when the necessity of such legislation was clearly evident, and when a war with Great Britain was imminent through the obstinacy of the New York authorities in refusing to surrender a British subject into the custody of the nation. This principle may evidently be extended to other cases. I am of opinion that the general government, under its function of controlling international relations, has the power, by proper

legislation, to prevent a state from repudiating its public debt, so far as that debt may be held by foreign citizens. I repeat, that in this Executive attribute, and in the capacity of Congress to pass laws in aid thereof, there is a source of power which has, as yet, been little resorted to, which has even been little thought of, but which is fruitful in most important and salutary results.

§ 681. When we reflect upon the great variety of treaties which may be made, and the compulsive character which the Constitution stamps upon them, the power of the general government, through their means, to control state legislation, is even more plainly apparent. With one illustration I leave this subject. A few years ago, the United States concluded a treaty with France, by which it was mutually stipulated that the citizens of each nation should have the same rights to acquire and hold property of every description in the territory of the other contracting party, that the citizens of the latter possessed by its own laws. The French laws make no difference between the power to acquire and hold personal and real property. Many of the American states, borrowing the rules of the Common Law, make a substantial difference. The treaty on the part of the United States stipulated that the general government should urge upon the states where aliens are incapacitated in any degree from acquiring and holding real estate, to make a change in their local laws in that respect, in favor of French citizens. This latter provision was clearly useless. If the treaty had expressly declared that French subjects may have full powers and rights to acquire and hold lands in any part of the United States, such compact would have overridden, in favor of Frenchmen, any state law forbidding aliens to acquire and hold real property. And such compact would have executed itself; it would have become part of the supreme law of the land; it would have required no Congressional sanction; state courts would have been bound to give it force. In fact, the treaty of 1794, between Great Britain and the United States, contained a provision identical in principle with the one supposed; for the citizens of each country were allowed to hold and inherit lands held

by them or their ancestors in the other country prior to the Revolution. It is, therefore, possible at the present day for a British subject to inherit lands in the United States, notwithstanding the laws of the particular state in which they are situated may deny to an alien this capacity. The validity of the stipulation has been repeatedly recognized and affirmed by the national and state courts, and many existing titles are based upon it.

### SECTION V.

#### THE POWER OF THE PRESIDENT TO GRANT REPRIEVES AND PARDONS.

§ 682. This power is conferred in the following language :  
“He shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.”

A reprieve is simply the suspension of a sentence, by which its execution is deferred, without there being any remission or change in the substance of the punishment.

A pardon is said by Lord Coke to be “a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty.” He adds : “All pardons of treason or felony are to be made by the king, and in his name only, and are either general or special. All pardons, either general or special, are either by act of Parliament, or by the charter of the king.”<sup>1</sup> A pardon is frequently conditional, as the king may extend his right upon what terms he please, or annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend.

The general language above quoted must be taken with the following limitations, which, indeed, Lord Coke expressly makes. The right, title, debt, or duty which the king may forgive, must be one due or owing to the state, and not one owing to a private person. Also, the offence must have been

<sup>1</sup> 3 Inst. 233.



committed, and the liability to penalty must therefore have accrued. A permission given to a person or class of persons to commit offences, with a pardon remitting the penal consequences thereof, would be absolutely void. The prerogative to issue such promissory pardons was once claimed by the crown; but the claim has long been abandoned. It would amount to a power of dispensing with the compulsive effect of statutes, or of the law generally, which the English people have resisted with success. In the *United States v. Wilson*,<sup>1</sup> Chief Justice Marshall, with his usual conciseness and clearness, gave a most admirable definition of a pardon. He says: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

§ 688. Sir William Blackstone, in the fourth Book of his Commentaries, speaks of pardons as an absolute prerogative of the crown; he falls into a rapture over the beneficent effects of this prerogative; he asserts that it is a most conclusive proof of the superlative excellence of the monarchical form of government; he leaves the impression that no one but the king can pardon. Sir William Blackstone's high Tory views are well known; his statements in regard to the crown and its powers and prerogatives, must all be taken with much allowance. Blackstone himself, in a subsequent part of his chapter on pardons, speaks of those granted by Parliament as having the greater efficacy, in that a pardon granted by the king after an attainder of felony, did not destroy the corruption of blood, while that granted by Parliament did; and in that a pardon granted by the king before conviction must be specially pleaded, while one granted by Parliament will be judicially noticed by the courts. This citation shows that Blackstone, notwithstanding his general declarations in regard to the prerogative of the crown, admits, as he must, and as Lord Coke expressly declares, that the British Parliament possess the same power.

§ 684. Can we argue from this state of things in England

<sup>1</sup> 7 Peters' R. 150, 159.

to our own country? We cannot entirely, but may partially. So far as the grants of power, legislative or executive, are concerned, we must be governed entirely by our Constitution. Congress cannot do an act simply because Parliament may, but only because the organic law expressly or impliedly says they may. The President cannot do an act simply because the British crown may, but only because the Constitution, either by its specific or by its general grants, has clothed him with authority. But on the other hand, when the Constitution, in conferring powers upon either department, has used general language familiar to the common law of England, which it has not attempted to define or limit, and when this language has particular reference to the private rights, liberties, and privileges of the citizen, and not to mere political functions, we must go back to the English law to discover the full meaning of the terms employed, and the consequent extent of the powers granted.

With the aid of these canons of interpretation, I propose to examine (1) the powers of the President to grant pardons, and (2) the powers of Congress over the subject.

§ 685. I. *The Extent of the President's Power.* — He shall have power to grant pardons. Pardons are not defined; no classification is made; no statement of the occasions on which they may be used; nothing descriptive or definitive. To obtain this particular and special meaning which shall interpret the clause, which shall throw light upon the executive authority, we must go back to the English law and inquire what pardon meant there; what pardons might there be granted; on what occasions; and with what effect. The extent of the President's function will thus be ascertained; he may resort to the act of grace whenever, under whatever circumstances, it might have been resorted to in England. This fundamental principle has been expressly recognized in one decision, and solemnly affirmed as the *ratio decidendi* in two judgments of the national Supreme Court. Thus, in the case of the United States *v.* Wilson,<sup>1</sup> Chief Justice Marshall said: "The power to pardon had been exercised from time immemorial by the

<sup>1</sup> 7 Peters' R. 150.

Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance ; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

§ 686. In *Ex parte Wells*,<sup>1</sup> the Supreme Court examined this subject with great care, in deciding upon the validity of a conditional pardon which had been granted by the President. They said : "In the law 'pardon' has different meanings, which were as well understood when the Constitution was made, as any other legal word in the Constitution now is. Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional, absolute, statutory, not necessary in some cases, and in some grantable of course. . . . We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardons, and the extent or meaning of the President's power to grant reprieves or pardons. It meant that the power was to be used according to law ; that is, as it had been used in England, and in these states while they were colonies ; not because it was a prerogative power, but as incidents of the power to pardon. . . . We think that the language used in the Constitution conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king as the chief executive. Prior to the Revolution, the colonies being in effect under the laws of England, were accustomed to the exercise of it in the various forms as they may be found in the English law books. They were of course to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and

<sup>1</sup> 18 Howard's R. 307, 310, 311.

familiar with the prerogatives exercised by the crown. Hence, when the words 'to grant pardons' were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachments." In another portion of the same judgment, the court said: <sup>1</sup> "But it was urged that the power to relieve and pardon does not include the power to grant a conditional pardon, the latter not having been enumerated in the Constitution as a distinct power. It not unfrequently happens in discussions upon the Constitution, that an involuntary change is made in the words of it. And even though the change may appear to be equivalent, it will be found, upon reflection, not to convey the full meaning of the words used in the Constitution. This is an example of it. The power as given is not to relieve and pardon, but that the President shall have power to grant reprieves and pardons. The difference between the real language and that used in the argument is material. The latter conveys only the idea of an absolute power as to the purpose or object for which it was given. The real language of the Constitution is general, that is, common to the class of pardons, or extending the power to pardon *to all kinds of pardons known in the law as such, whatever may be their denomination*. We have shown that a conditional pardon is one of them. In this view of the Constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms." These views were again distinctly affirmed by the same court in *Ex parte Garland*.<sup>2</sup>

§ 687. Applying these principles to the determination of the President's power, and we say that he may resort to all the species which are included in the genus mentioned in the Constitution; he may at his discretion employ all the special acts of grace which in the English law would fairly fall under

<sup>1</sup> 18 Howard's R. 314.

<sup>2</sup> 4 Wallace's R. 333, 380.

the general term pardon. There were certain kinds of pardons issued on certain different occasions, and having certain different effects. The President may use any of these at will. Thus, after the indictment, trial, conviction, and sentence of an offender, a pardon may be granted to him for that particular offence, which shall have the effect to remit the whole punishment, or that portion of it not yet inflicted, and to restore the person to all the rights which he may have forfeited as a penalty of his crime. Such a pardon would of course address itself to the ministerial officers who are charged with the duty of executing the sentence. This is by far the most common form of pardon used in modern times.

§ 688. A second species known to the English law was the conditional pardon, generally issued after conviction and sentence, where the king annexed some condition to his act of grace, which the offender must accept and perform, or the pardon would be a nullity. The condition usually consisted in the substitution of some other punishment in the place of that which had been awarded by the court; or it might require of the criminal that he should do some positive act, as to leave the kingdom and live abroad. The former kind of conditions are often known as commutations of the original sentence, and are to be distinguished from those absolute pardons which remit part of a punishment, leaving the residue as originally imposed, and substituting no other penalty in the place of that remitted. The power of the President to issue conditional pardons was discussed and most conclusively established in *Ex parte Wells*<sup>1</sup> before referred to.

§ 689. The king might also grant a pardon to a particular offender, forgiving him some specified crime, or all the crimes which he had committed, at any time before conviction, and even before trial, or indictment, or apprehension, or any official charge of crime made against the person. Such a pardon must address itself to the courts before whom the individual might afterwards be brought for trial; it must be brought to the notice of the judges as a fact. By the ancient English rules of pleading in criminal causes, it was required

<sup>1</sup> 18 Howard's R. 307.

that such a pardon, if received before conviction, should be pleaded in bar of the indictment; but if received after conviction and before sentence, should be pleaded in arrest of judgment. It is more than probable that at the present day it would be considered sufficient to present such a pardon to the notice of the court by motion, and that a formal plea would not be required. Even in the English law such formality was not required in at least one instance. Where Parliament pardons all persons, without any description of their offences, they need not plead the act of grace, but the courts will take judicial notice thereof.<sup>1</sup>

Pardons issued before conviction, or trial, or indictment, or any official proceeding, are well known to the English law; indeed there is no doubt that anciently they were more common than any other kind. Of course they assume that a particular person has, before the act of grace, committed some offence against the laws, for which he would be criminally liable. They must apply to an existing state of circumstances, where the liability has been fixed, and nothing remains to be done but to enforce that liability through the remedial process of the courts.

§ 690. The President has, under the generic language of the Constitution, full power to issue pardons to particular offenders before conviction, trial, indictment, or any official proceeding against them. This conclusion is inevitable from the reasoning in *Ex parte Wells* quoted in § 686. But the Supreme Court has expressly decided the point. In *Ex parte Garland*,<sup>2</sup> the petitioner Garland had been engaged in the rebellion; the President had granted him a full pardon although no criminal proceedings had been instituted against him; he applied to be re-admitted to practice at the bar of the Supreme Court without taking the test oath; and rested his case partly upon the pardon he had received. The court, by Mr. Justice Field, said: "The power thus conferred [to grant pardons] is unlimited, with the exception stated [as to impeachments]. It extends to every offence known to the law, and may be exercised at any time after its commission, either

<sup>1</sup> 1 Chitty's Cr. Law, 466.

<sup>2</sup> 4 Wallace's R. 333, 380.

before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions." The dissenting judges did not deny the correctness of these doctrines. They simply claimed that, as the statute requiring a test oath did not impose any penalty or punishment, but only prescribed a qualification, the pardon did not reach this case and relieve from the necessity of subscribing to the oath.

§ 691. May the President, under this grant of the Constitution, issue a general pardon to a class of offenders, without designating any particular individuals by name? At the present day such an act of grace is often called a general amnesty. Although the word is current in our literature, and has a quasi-legal signification, yet amnesty is not a technical word of the common law; it is not to be found in the old abridgments, digests, and text-books as a term of art. Some discussion has lately arisen in regard to the comparative scope and efficacy of an amnesty and of a pardon. It has been said that a pardon simply removes the penal consequences of a crime, while an amnesty blots out the crime altogether, and leaves the offender as though it had never been committed. The correctness of any such distinction in the English law may well be doubted; but it is sufficient to say that if an amnesty is something greater and more efficient than a pardon, then it certainly does not fall within the power conferred upon the President to grant pardons. But taking the word amnesty in its popular sense as an act of grace extended to an indeterminate class who have all been guilty of a common offence, may the President issue an amnesty?

§ 692. The English law divided pardons into particular and general. The ancient text-writers and cases constantly refer to this division as one existing and well known. Particular pardons must be granted to determinate, specified criminals. General pardons had a double meaning, and much confusion

will be avoided by taking notice of this fact, that two varieties were embraced in this species. A pardon granted to an individual, forgiving him for all crimes whatever, or for all crimes of a certain class, which he had before committed, was called a general pardon. An act of grace issued to a class of individuals who had been engaged in a common offence, without specifying any particular persons as the recipients of favor, was also known as a general pardon. It cannot be denied that the king possessed the power to use this latter variety of pardons, and that in ancient times he exercised the prerogative with some freedom. Neither can it be denied that in later times the Parliament has usually extended the pardoning grace in such cases by an act or statute of indemnity, and that the kingly power has not been invoked. Still this kind of general pardons, whether granted by the crown or by Parliament, is well known and recognized in the English law ; it falls under the denomination pardons ; and it is equivalent to an act of general amnesty, as that word is used at the present day.

§ 693. I am strongly inclined to the opinion that the President is clothed with a constitutional authority to issue such a general pardon to a class of persons who have incurred the penalties of the law. Applying the principle firmly established by the Supreme Court, that the power to grant pardons includes all species, it would seem that this special variety was embraced as well as any others. This conclusion is strengthened when we consider the effect of such an act of grace. Its intrinsic nature and its results are identical with those of a particular pardon. The only element of distinction is the vagueness with which the recipients of favor are described ; but this uncertainty can always be removed, if necessary, by evidence identifying the person as one of the class mentioned in the terms of the amnesty. But again, in proclaiming a general pardon, the President is doing nothing more than he may confessedly accomplish by pursuing another method which is entirely under his control. He may certainly single out all the persons who compose the class, and confer a separate pardon upon each. As soon as he had gone through the whole number, the results of an amnesty would have been at-



tained. If it should be said that in granting a pardon to a specified individual the President would be exercising an amount of discretion, that he would be governed by the peculiar circumstances of the individual case ; I answer, as a fact this is doubtless true, but as a prerequisite to a legal forgiveness, it is not true. The President has *power* to pardon for no cause, as well as for good cause. His exercise of the function in such a manner might expose him to impeachment, but the act itself would be valid.

§ 694. The President's power to issue an amnesty has been denied, because the Supreme Court of the United States decided in *United States v. Wilson*,<sup>1</sup> that a pardon issued before conviction must be pleaded ; and it is urged that the act of grace must therefore be a separate deed given to a specified individual. This objection is certainly without weight. It would be sufficient to say that the Constitution is not to be construed by applying to it the ancient common law rules of pleading in criminal cases. But the decision of the court is entirely misapprehended. It was not held that every pardon granted before conviction must be pleaded, but only that every pardon conferred upon a specified individual must be brought to the notice of the court as a fact, and that anciently this must be done by a plea. But even had the court determined as an inflexible rule that every pardon must be pleaded, the inference claimed would not follow, unless the further rule had been laid down that the plea must be accompanied with proferret. Indeed, in this case, Chief Justice Marshall was simply conforming to a familiar practice of the English courts. As a pardon is not a general law, the judges cannot take cognizance of its existence ; it must be brought before them in the same manner as any other fact. There is no difference in this respect between a particular and a general pardon issued by the king ; each must be pleaded, when it is relied upon as a defence, and both would be pleaded with the same ease and in the same manner. But if the act of grace is embodied in a general statute of Parliament, the judges take cognizance thereof, and it need not be brought to their notice. An

<sup>1</sup> 7 Peters' R. 150.

English writer of authority gives the following rules as the result of ancient cases.<sup>1</sup> "When the prisoner has either personally obtained a pardon, or is included in a general act of grace, he must plead that privilege specially. But when Parliament pardons all persons without any description of their offences, they need not plead." The objection I am considering seems therefore to fail both in its facts and in its inferences.

§ 695. II. *The Powers of Congress over Pardons.* — Is any legislative action needed to aid the President, or can any legislative action restrict him, in the exercise of his function? Plainly not. Pardoning is clearly a kind of executing, not of making laws. As far as authority is conferred upon the Chief Magistrate, it can neither be extended or limited by Congress. A statute passed to give construction to the Constitution, and to confine its operation to particular classes of pardons, would be a palpable usurpation of the judicial function. Thus, an act of Congress which should take away the President's power to confer conditional pardons, or to grant pardons before trial, would be absolutely void. The same would be true of a law which should assume to restrain him from proclaiming a general amnesty, if the latter is included within the terms of the Constitution.

§ 696. Has Congress any independent authority over the subject? None is conferred in express language, and if any exists, it must be implied from the power to define and punish crimes. The legislature may, beyond doubt, relieve existing offenders from the penal consequences of their acts, by repealing the law which defined the crime and apportioned the punishment. Thus the results of a general pardon or amnesty would be reached in an indirect manner. But while the statute remains in force, and the penalties are impending, it would seem that the national legislature cannot interpose and extend an act of grace either to a specified criminal, or to an indeterminate class. The general grant of power to the President would seem to cover the whole case, and to leave no room for legislative action. Again, a pardon is confessedly a

<sup>1</sup> 1 Chitty's Cr. Law, 466.

step in the execution of laws, and the American Congress, unlike the British Parliament, has no executive function. It may apportion the punishment; it may make that punishment conditional; but when it has once decided upon the penalty, its authority would seem to be ended. Remission is a proper act of the President and not of the legislature.

## SECTION VI.

### THE POWER OF THE PRESIDENT TO GIVE INFORMATION AND TO RECOMMEND MEASURES TO CONGRESS.

§ 697. "He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." The necessity of the first clause is apparent. By virtue of his official position the President becomes acquainted with a vast detail of facts which are most important for Congress to know, but which that body possesses no means of knowing except through the Executive. Thus the items and total amount of the revenue and of the expenditure, upon which so much of the economical legislation is based; the situation of our relations with foreign countries; the number and disposition of the land and naval forces; the character, cost, and condition of the armaments and supplies, — these and a thousand other matters of detail are first known by the Executive Department, and must be communicated by it to Congress, as the basis of the annual or occasional legislation.

§ 698. From the very organization of the present government the practice has been uniform for the President to communicate the greater part of this information in a message sent to Congress at the opening of each session. This message is accompanied by a full and minute detail of the various operations of each department during the year. The President may at other times transmit information; and the Congress, or either House, may request more particular statements respecting any matter deemed by them important. When a demand is made, the President may, and often does, withhold the facts,

if in his opinion their communication at the time would be prejudicial to the public interests. Congress may have requested information concerning matters over which they have no direct legislative power ; but the President cannot refuse, on that ground alone, to make the statement. It would be almost, if not quite impossible, to conceive of any facts respecting the condition of the nation, which could not in some manner be made useful by Congress in matters entirely within its jurisdiction. Even if every other possible reason failed, all information must be useful, as it would affect the oversight which the House of Representatives may always have of civil officers, and their power to impeach such officers.

§ 699. Thus, during the late civil war, the two houses appointed a joint committee on the state of the war, which collected a vast amount of evidence respecting the various military operations. Now, Congress has very little to do, in any direct manner, with the conduct of war, and the information obtained could not be used as the basis of any immediate legislation upon military movements. But the knowledge thus acquired was of the highest value as an aid in forming correct conclusions upon the all-important subject of supplies. Congress has very little to do in a direct way with the management of foreign relations ; but a knowledge of those relations may be absolutely necessary as bearing upon the question of declaring war, or of raising an army or equipping a navy in preparation for anticipated hostilities. In conclusion, all information on all possible subjects connected with the welfare of the country, may be useful to Congress, and may be demanded by them. The President cannot refuse to respond on the ground that the facts can be of no use to the legislature ; Congress, not he, must judge of their value. But the President may decline to communicate at the time, when in his judgment the public welfare requires the facts to be kept private ; as soon as the necessity for such concealment is past, he must respond to the legislative call.

§ 700. The second clause — he shall recommend to the consideration of Congress such measures as he shall judge necessary and expedient — seems to have a plain and definite

meaning ; and the power, according to that meaning, is reasonable and just. But a signification has been given to it, during a large part of our political history, entirely different from that which must have been contemplated by the framers of the Constitution ; and a practice has grown up utterly opposed to the spirit of the organic law. The President, having access to information, and being familiar with the practical working of the laws, will be sure to perceive the occasions for amendments, additions, repeals ; in short, for measures which he deems necessary or expedient. These improvements and alterations he may recommend to Congress. I do not think that a fair interpretation of the clause would require him to stop with a simple suggestion ; he may, doubtless, state facts and use arguments in support of his views ; may endeavor, to the best of his ability, to show why the proposed measure is necessary or expedient. So much is plainly embraced in the word recommend. All this is simple, satisfactory, in strict accordance not only with the letter of the clause, but also with the spirit of the whole instrument. The President uses his prior official knowledge ; is convinced from that knowledge that certain measures are demanded ; proposes those measures to Congress with whatever of argument he thinks proper, and there leaves the matter. He has discharged his duty, and the responsibility is now with the law-making power.

§ 701. How different is the reality from this picture. How often have Presidents and their cabinets seemed to regard themselves as the great legislative department, and the Congress as a body expected to receive and act upon their views. Not content with recommending measures, they have frequently set themselves at work, with all the appliances at their command, to procure those measures to be adopted, as though the passage of certain statutes was the chief object of their administrations, and the chief work of their official career. The evil is not a recent one ; it had its origin immediately after the time of those Presidents who assisted in laying the foundations of the government, but it has developed with rapidity in recent years.

§ 702. While the President should not be interfered with in

the discharge of those functions which are committed to him by the organic law, the legislature should be left no less free to act within their own peculiar sphere and range of duties ; the Chief Magistrate should not overstep the line which separates their respective domains. The Constitution evidently contemplates the Congress as the great legislative body, and the President as the great executive officer. This is undoubtedly the essential, the fundamental idea of the general plan. The organic law does, indeed, recognize two exceptions to the universality of this principle, and beyond those exceptions neither Congress nor President should go. One exception has just been stated. The other exists in the fact that the President must pass upon all statutes, and approve or disapprove ; and that, if he disapprove, he must give his reasons therefor. This, as I have before shown, makes him in a certain sense a co-ordinate branch of the legislature ; and he may, therefore, and indeed must, have his opinions as to the policy of enactments which have gone through the Congress. But he cannot originate measures, or debate them, or express his views upon them, except when he disapproves of a bill presented to him, or when he recommends them to the consideration of the legislature. The spirit of the Constitution, which separates the legislative and executive functions, is departed from to this extent, and no more. It cannot be denied, however, that the modern practice has departed from that spirit much farther, and has thereby tended to destroy one of the principal safeguards of every free, constitutional government — the independence of the Executive and Legislative Departments. The final and perfected result of this practice would be the accumulation of all governmental power in the hands of the sole executive officer ; Congress would be virtually driven from its position as an independent, co-ordinate branch, and made the mere registrar of the President's informal decrees. This gradual change from the letter and spirit of the organic law, and the growing tendency to treat all offices as mere political rewards, and the employment of the appointing power as a means of influencing legislation, have certainly weakened the well-contrived system of checks and balances which ought to have

prevented either branch of the government from usurping the functions of any other.

## SECTION VII.

### THE POWERS OF THE PRESIDENT AS COMMANDER-IN-CHIEF.

§ 708. "The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the United States when called into the active service of the United States." In this connection we may read Article I. Section IX. § 2: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The President is thus clothed with a most important military function: he is to command the forces at all times, Congress never commands them; as such commander, he wages war, Congress never wages war. We must endeavor, however, to ascertain the exact limits of this attribute, and to distinguish it from the ordinary duty of executing the laws. The legislature alone furnishes the occasions upon which it can come into play, but cannot interfere with or control the attribute itself. Congress raises and supplies armies and navies, and makes rules for their government, and there its power and duty end; the additional power of the President as supreme commander is independent and absolute. Mr. Chief Justice Chase very clearly and correctly expressed this general principle in *Ex parte Milligan*.<sup>1</sup> He said: "The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law." The legislative powers which relate to the raising, equipping, supplying, and governing the land and naval forces, have nothing in common with the separate and distinct

<sup>1</sup> 4 Wallace's R. 2, 139.

function of commanding those forces; no particular statutes passed under the former class of attributes, can interfere with the President in his exercise of the latter. Even the general clause of Article I. Section VIII. § 18, which authorizes Congress to make all laws necessary and proper to carry into execution the powers conferred upon any department of the government, cannot permit the Congress to assume the capacities and duties of Commander-in-Chief.

§ 704. In fact, the attributes of the legislature in respect to military matters, are essentially the same in peace and in war. The power to make rules for the disposition of captures becomes practically efficient in every war; that to suspend the privilege of the writ of habeas corpus can exist only during an internal war. With these exceptions, Congress possesses all the occasions for its action, and may pass all kinds and classes of laws, whether the country be at peace or engaged in war. Without doubt there will be a greater necessity for raising troops, borrowing money, furnishing supplies, and the like, during the existence of actual hostilities than during seasons of tranquillity; and the people will then endure particular measures which they would not tolerate for a moment at a time when the emergency was not so great. But no authority can generally arise from a state of belligerency, for Congress to pass entirely new classes of statutes which it could not constitutionally enact before. Even the rules for the disposition of captures could all be elaborated before any hostilities commenced, and before any captures were actually made.

§ 705. In time of peace, therefore, the President's functions, as far as they relate to the army and navy, are of two separate and entirely distinct characters, and to avoid confusion we must carefully distinguish between these attributes. In respect to certain classes of measures he acts entirely in his general capacity of Executive, and takes care that the laws are faithfully executed. Congress, under its supreme authority, passes laws which concern the military alone, and these the President must enforce with the same diligence, and by virtue of the same function, that he carries out those legislative mandates which apply alone to civilians; he is not then oper-



ating as commander, but as a supreme civil magistrate. But as Commander-in-Chief, he calls other attributes into action, for which the legislature has furnished the occasion, but which do not consist in executing any positive laws. I repeat, it is important that these two classes of powers and duties should be kept distinct. Under its authority to raise armies, maintain navies, furnish supplies, and the like, Congress may direct the manner in which the President's power shall be exercised, for he will be, in fact, but executing its commands. Thus it may determine how many men shall be enlisted in each branch of the service, or what and how many armed vessels shall be constructed. As Congress is to make all appropriations, it may declare the specific purpose for which money is to be used; what forts shall be erected, and their cost; what ships built, their character and cost; what kind of arms purchased or manufactured, and the cost. Instances of this sort might be multiplied. In all these cases great or little discretion may be left to the Executive and his subordinates, as the legislature deems best. Congress is authorized to make rules for the government of the land and naval forces: it may therefore arrange and classify these forces; fix upon the plan of organization; determine upon the number, duties, and pay of officers; define military offences and allot the punishment; provide for the creation, jurisdiction, and procedure of courts-martial, and for carrying out their sentences. The President's duties in respect to these various subjects may thus be clearly defined and controlled by the legislature. But in time of peace he has an independent function. He commands the army and navy; Congress does not. He may make all dispositions of troops and officers, stationing them now at this post, now at that; he may send out naval vessels to such parts of the world as he pleases; he may distribute the arms, ammunition, and supplies in such quantities and at such arsenals and depositories as he deems best. All this is a work of ordinary routine in time of peace, and is probably left in fact to the Secretaries of War and of the Navy, and to military officers high in command.

§ 706. When actual hostilities have commenced, either through a formal declaration made by Congress, or a belliger-

ent attack made by a foreign government which the President must repel by force, another branch of his function as Commander-in-Chief comes into play. He wages war, Congress does not. The legislature may, it is true, control the course of hostilities in an indirect manner, for it must bestow all the military means and instruments ; but it cannot interfere in any direct manner with the actual belligerent operations. Wherever be the theatre of the warlike movements, whether at home or abroad, whether on land or on the sea, whether there be an invasion or a rebellion, the President as Commander-in-Chief must conduct those movements ; he possesses the sole authority and is clothed with the sole responsibility. In theory he plans all campaigns, establishes all blockades and sieges, directs all marches, fights all battles.

§ 707. We will now inquire what particular powers may be wielded by the government, or by some department thereof, in time of war, which cannot be exercised in time of peace. Article I. Section IX. § 2 is in these words : “ The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion the public safety may require it.” It has been asserted that this clause confers no authority to suspend the privilege of the writ of habeas corpus and that it is entirely restrictive in its meaning and operation. This construction is arbitrary and forced to the last degree. The plain import of the language, which has been adopted by Congress, the President, and the Courts, is that in an internal war, whether of invasion by a foreign enemy or of rebellion, the privilege of the writ of habeas corpus may be suspended when the public safety shall demand such an extreme measure. The power to suspend being thus conceded, the practical question then arises, to which department of the government is its exercise intrusted. The venerable Horace Binney, in two essays published in the years 1862, 1863, has, with a vast amount of research and learning, and by a course of argument from which it is difficult to escape, maintained the propositions that suspending the privilege of the writ of habeas corpus is a civil executive act ; that the power to suspend belongs to the President in his civil capacity ; and that no

fiat of the legislature is necessary in order to make the act legal. The opinion is almost universal, however, that Congress must take the initiative, and pass a statute which either directly produces the effect of suspension, or which authorizes the President to withdraw the privilege of the writ. Congress has adopted this view, and their action seems to have been sanctioned by the Supreme Court.

§ 708. Assuming, therefore, that during a rebellion or an invasion, the Congress may, if the public safety shall require it, suspend, or authorize to be suspended, the privilege of the writ of habeas corpus, the most important inquiry is immediately suggested, What is included within this proceeding? what particular measures may the legislature or the executive adopt by virtue thereof? Is the clause in the Constitution a permission for Congress or President to disregard, during the contemplated emergency, all those safeguards which the Bill of Rights has thrown around life, liberty, and property? If this be so, a power most dangerous, and directly opposed to the general spirit of the organic law, was conferred by language which effectually concealed the greatness of the gift. We cannot suppose that the statesmen who drafted or the people who accepted the Constitution, intended to grant such an authority to their rulers. Horace Binney, in a third essay upon this subject, has investigated the meaning and extent of the power, and has shown the limits of its operation, by an argument which amounts to an absolute demonstration.<sup>1</sup> His conclusions I adopt and briefly state without any reference to the sources and precedents whence they are drawn. Suspension of the privilege of the writ of habeas corpus, or of the writ, or of the Habeas Corpus Act — three expressions for the same thing — had a settled and well known meaning in the English law, with which the framers of the Constitution are to be taken as familiar. It “did not recall to any one any other legal power, proceeding, or effect, than that of arresting persons suspected of treasonable designs, committing them to prison, and uplifting beyond their reach the writ of habeas corpus as a means of relief.” That which the British govern-

<sup>1</sup> The Privilege of the Writ of Habeas Corpus : Part Third, Phila. 1865.

ment can do without any limitations, the Constitution permits to be done only under the conditions of invasion or rebellion. The suspension of the writ does not in the least affect the authority over arrests; the power to suspend does not enable Congress to allow or the Executive to make arrests without legal cause, or in an arbitrary and irregular manner; but merely enables the government to detain a prisoner arrested for good cause, for an indefinite time without trial or bail. Suspending the writ does not legalize seizures otherwise arbitrary, nor give any greater authority to the Executive than that of detaining suspected persons in custody whom it would else be obliged to bring to a speedy trial or to release on bail. These conclusions as to the power of Congress and the President derived from the habeas corpus clause of Article I., Section IX., reached by Mr. Binney through his masterly analysis of English precedents, have received the approval of the Supreme Court of the United States; in fact they were adopted as the very ground of deciding one branch of the great case *Ex parte Milligan*.<sup>1</sup> Mr. Justice Davis delivering the judgment of the court said: "The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty." In a word, Congress and President derive no new affirmative power from the habeas corpus clause, but only a negative power of passive resistance.

§ 709. But may not the President or Congress derive some additional powers during war, from a source entirely independent of the habeas corpus clause? Do the express prohibitions of the Constitution still restrain them when operating with the military arm? One answer to these inquiries is plain; its correctness must be acknowledged at once. If either the President or Congress may thus acquire an excess of powers during war, it must necessarily be by virtue of some special function given by the Constitution, which becomes active only at that time, and whose nature is so peculiar that its perfect efficiency is incompatible with any express restraints upon its operation; this incompatibility must be so great and the func-

<sup>1</sup> 4 Wallace's R. 2, 115.

tion itself so important, that an exception in regard to it is to be considered as necessarily implied in the Bill of Rights. Does any department of the government possess such a function which may at times displace some of the safeguards that protect life, liberty, and property?

§ 710. I answer unhesitatingly, Congress does not. The position maintained by Mr. Chief Justice Chase and other dissenting judges in *Ex parte Milligan*,<sup>1</sup> that Congress may, under certain circumstances, provide for martial law, military arrests and trials of civilians, seems to be the most utterly indefensible of any. It is universally conceded that the legislature cannot resort to these violent measures in peace. But in fact, Congress possesses no function whatever that can be taken as the basis of its authority to enforce martial law in war, which would not be an equally strong support for the exercise of that authority in peace. Is it the function of establishing inferior courts, or of raising armies and navies, or of governing the forces? All these might be called into full action in time of peace. The power to make rules concerning captures plainly does not involve the consequences under consideration, while that of declaring war is exhausted by the very act of declaration. Indeed, it is only by imputing to Congress an attribute not granted to it—that of waging war—that its authority to enforce martial law can receive even a semblance of support.

§ 711. Is the President clothed with the function? If so, it cannot be in his capacity of executive magistrate, for as such he must execute laws, and he, to an equal extent with the law-makers, is bound by the inhibitions of the first eight Amendments. If the President may resort to martial law under any circumstances, it cannot be as a part of either the judicial or the legislative systems of the United States, but must be as a special means of waging war, of carrying out the particular duties which devolve upon him as Commander-in-Chief. If military arrests, trials, and punishments employed against civilians are ever lawful, they are so not because they are a kind of judicial proceeding supplementing the ordinary

<sup>1</sup> Wallace's R. 2.

methods of peace, but because they are a species of hostilities directed against individuals who have placed themselves in the position of enemies, and have therefore deprived themselves of all the safeguards which the Constitution throws about the lives, liberty and property of citizens.

§ 712. Does such a power exist? There are three subjects bearing related names, but having no elements in common, and care should be taken to distinguish them. "Military Law" is the code of rules for the government of the army and navy; it is a department of the municipal law applicable to a small portion of the people engaged in a special service; it is enacted by Congress and executed by the President; civilians are, by the very terms of the Constitution, exempted from its operation. "Military Government" is the authority by which a commander governs a conquered district, when the local institutions have been overthrown, and the local rulers displaced, and before Congress has had an opportunity to act under its power to dispose of captures, or to govern territories. This authority in fact belongs to the President; and it assumes the war to be still raging, and the final status of the conquered province to be undetermined, so that the apparent exercise of civil functions is really a measure of hostility. "Martial Law" is something very different. It acts, if at all, within the limits of the country, against civilians who have not openly enrolled themselves as belligerents among the forces of an invading, or a rebellious enemy; if set in motion at all, it must be as a concomitant of war. It is thus described by a late writer:<sup>1</sup> "Martial Law is, in short, the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed or settled rules or laws, no definite practice, and not bound even by the rules of the military law." If this description bears any resemblance to the fact, every American citizen must hope that neither President nor Congress can set such an engine of abuse and oppression at work within the limits of the United States.

<sup>1</sup> Finlason on Mar. Law, p. 107.

§ 713. A most elaborate and exhaustive examination of the power to enforce martial law in Great Britain was lately made by Lord Chief Justice Cockburn.<sup>1</sup> After a review of the precedents ancient and modern, set forth in the wonderfully clear and orderly manner for which he is so preëminently distinguished, the Chief Justice reaches the conclusion that the Crown has no authority by virtue of its prerogative to enforce martial law in any part of the realm where the laws of England prevail; but admits that Parliament may call it into being and operation. A solemn judgment of the Supreme Court in *Ex parte Milligan*<sup>2</sup> has denied the lawfulness of martial law within the United States, except in districts actually occupied by the opposing forces, which are the very theatre of hostilities, and in which the civil courts are, for the time being, completely displaced. The extent of this exception will appear in the following extract from the prevailing opinion: <sup>3</sup> “It follows from what has been said on this subject, that there are occasions when martial rule can properly be applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction.”

§ 714. These sweeping conclusions of the Supreme Court seem to be open to some criticism. Mr. Justice Davis in the passage quoted, seems to have confounded martial law with military government, and to have overlooked the fact that martial law is not in any true sense a judicial proceeding, or

<sup>1</sup> Charge of the Lord Chief Justice of England, in the case of the *Queen v. Nelson and Brand*. London, 1867.

<sup>2</sup> 4 Wallace's R. 2.

<sup>3</sup> *Ibid.* 127.

a means of executing the civil laws, but is a method of waging war. It may be conceded that the President has no authority to declare or proclaim martial law, and make it general in a district where the courts are open and unobstructed; Congress certainly has none. But the President, as Commander-in-Chief, wages war; the sole object of his hostile endeavors is success. In respect to some of his operations he is certainly untrammelled by the restraining clauses of the Bill of Rights. In an internal war of rebellion the enemies are citizens and traitors, and thus guilty of civil offences; but he may kill or capture them, or seize and destroy their property, and thus break up their armed opposition. The possibility of civil war therefore demands at least one implied exception to the general clauses of the first eight amendments. May it not admit of others? One other is universally conceded. A citizen civilian, in no way connected with the hostile array as a belligerent, who should act as a spy upon the military movements, operations, and preparations, may be seized, tried, and punished by military agents. The explanation of this acknowledged rule is simple and plain. A spy interferes directly with the process of waging war; he perils the success of extensive campaigns; he renders the final result of the struggle doubtful; he is in fact acting as an enemy, may be treated as an enemy, and as an enemy forfeits all civil protection, even though his offence might also be considered as treason. This illustration may serve to indicate the occasions upon which the President may resort to martial law, and the limits upon its exercise by him. Whenever a civilian citizen or alien is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result, and when, therefore, these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President as Commander-in-Chief may treat this person as an enemy, and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his



offence may be sedition or treason, or perhaps may not be recognized as a crime by the civil code.

I am aware that such a person would not technically be an enemy, and if arrested would not technically be a prisoner of war; but he would be a quasi-enemy, and would have placed himself beyond the pale of civil protection. If these views are correct, it follows that the legality of every military arrest, trial, and punishment must be determined upon its own circumstances, and not according to any general and inflexible rules. In fact, these proceedings would be placed upon exactly the same footing as those other apparent breaches of the Bill of Rights which consist in destroying the private property of civilians, or appropriating it to use, when military exigencies demand such measures.<sup>1</sup>

## SECTION VIII.

### IMPEACHMENT.

§ 715. The clauses of the Constitution which directly refer to Impeachment are the following: "The House of Representatives shall have the sole power of impeachment." Art. I. Sec. II. § 5. "The Senate shall have the sole power to try all impeachments; when sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Art. I. Sec. III. §§ 6 and 7. "The President and Vice-President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors." Art. II. Sec. IV. The im-

<sup>1</sup> See § 254-256.

portant questions which arise from these provisions are: (1.) Who may be impeached. (2.) What are the legal grounds of an impeachment. (3.) What punishment may be inflicted. In respect to the second of these questions, there is a direct opposition of opinion among public writers and statesmen, and no conclusion has been reached with so much certainty that it may be considered as incorporated into the constitutional law. I can do no more, therefore, than state the positions which have been maintained, the arguments in their support, and my own preferences. All that is said must be, to a certain extent, speculative.

§ 716. (1.) *Who may be Impeached.* The language of the Constitution plainly excludes all private persons, and all officers in the land and naval forces; does it include all individuals holding an official position under the United States, whose duties are civil in their nature as opposed to military? In 1797, upon the trial of an impeachment preferred against William Blount, a Senator, the Senate decided that members of their own body are not "civil officers" within the meaning of the Constitution, and therefore dismissed the charges without any examination upon the merits. This rule must apply also to members of the Lower House; and, as far as the precedent can be considered an authority, it may be regarded as settled that Senators and Representatives are not impeachable. The term "civil officers" embraces, therefore, the judges of the United States courts, and all subordinates in the Executive department. This construction which includes the judiciary and excludes the legislature, is, to say the least, somewhat strained. The discretion given to legislators is and must be very great; no limits can be placed upon its ordinary use within constitutional bounds; but its unlawful, corrupt, or heedless exercise should be restrained by some compulsive sanction. The law-makers may be guilty of treason, bribery, or other official acts to which the term "high crimes and misdemeanors" is applied; the consequences of their guilt may be ruinous; every consideration in favor of subjecting President or judges to the liability of an impeachment, would seem to apply with equal force to them. It is true that Senators

and Representatives may be expelled by the body to which they belong, but this punishment is plainly inadequate; expulsion removes from the present office, but is no obstacle to a reëlection thereto, nor does it disqualify from holding any other position of honor, trust, or profit. Should the House of Representatives and the Senate ever be called upon to reëxamine the rule adopted in the case of William Blount, they may, perhaps, reject the authority of that single precedent.

§ 717. (2.) *What are the lawful grounds of an Impeachment.* Two answers have been given to this question, resting upon two opposed theories of construction. One theory, maintained with great ability, both upon principle and authority, by a large school of public writers, confines the operation of the impeachment clauses within very narrow limits. According to it, an impeachment can only be preferred against an officer of the United States, on account of some indictable offence which he has committed. Assuming this general doctrine to be correct, and taking into account the further special rule that all crimes against the United States must be statutory, the final conclusion is reached that the officer must have been guilty of an offence which had been made indictable by a positive law of Congress. This law must have been passed prior to the commission of the criminal act, because a statute subsequent thereto declaring the act penal, and imposing a punishment, would be an *ex post facto* law, and obnoxious to express inhibitions of the Constitution.

§ 718. The course of reasoning which supports the theory and leads to this result, consists of two branches. The first branch of the argument is not based upon any peculiar phraseology of the Constitution, but upon the general nature of impeachment as a method of criminal procedure known to the English law. It may be condensed as follows: The House of Representatives have the same powers to present, and the Senate to try, an offender, that are held by the British Commons and Lords, — these and no greater attributes are conferred in the word “impeachment;” it is settled in England that an impeachment is only regular and lawful as a mode of presenting, trying, and convicting for an indictable offence;

the two houses of Congress are therefore limited in the same manner; finally, as there are no common law crimes against the United States, but only those created and defined by some statute of Congress, the President, Vice-President, and all civil officers can only be impeached on account of some act which had been declared an indictable offence by a positive law of the national legislature.

The second branch of the argument is based upon the peculiar phraseology of the Constitution. It may be condensed as follows: Officers can only be impeached for "treason, bribery, and other high crimes and misdemeanors;" the phrase "high crimes and misdemeanors" is to be taken in a strict technical sense, and is equivalent to "felonies" and "misdemeanors," which are words of art embracing all indictable offences and no more; therefore the ground of an impeachment must be an act which Congress had made a "felony" or a "misdemeanor" in its positive criminal code.<sup>1</sup>

§ 719. The second theory does not confine the House of Representatives as the accusers, or the Senate as the triers, within such narrow limits. It regards the process of impeachment as the important personal sanction by which the observance of official duties is secured, as the very keystone by which the arch of constitutional powers is held in place. (See §§ 122, 149.) As the punishment to be inflicted has reference solely to the offender's official position, so the acts for which that punishment was deemed appropriate must have reference, directly or inferentially, to the offender's official duties and functions. Wherever the President, or Vice-President, or any civil officer has knowingly and intentionally violated the express terms of the Constitution, or of a statute which charged him with an official duty to be performed without a discretion, and wherever a discretion being left, within the bounds of which he has an ample choice, he exercises that discretion

<sup>1</sup> This theory is set forth with great ability, the English and American authorities in its support are fully cited, and the arguments in its favor are exhausted in 6 *American Law Register* (N. S.) 257, and in the Report of the minority of the Judiciary Committee, presented to the House of Representatives Nov. 25, 1867.

in a wilful and corrupt manner, or even in a rash and headstrong manner, unmindful of the ruinous consequences which his acts must produce, he is impeachable; and it makes no difference whether the act has been declared a felony or a misdemeanor by the criminal legislation of Congress, or was regarded as such by the common law of England. Indeed, in this view the officer might be impeachable for very many breaches of public duty which it would be impossible to treat as ordinary crimes and to define in the statute book as indictable offences. Thus the President has a power to grant pardons uncontrolled and uncontrollable by Congress; every pardon which he issues is valid, whatever be his motive and intent. It would be absolutely impossible for the legislature to make the conferring a pardon in any specified case or manner a crime for which an indictment would lie. But it cannot be denied that the President, although not bribed, might exercise this function in a manner which would destroy the efficacy of the criminal law, and evince a design on his part to subvert the very foundations of justice. For such acts he would be impeachable. Again: the President has the sole power to carry on negotiations with foreign governments. Congress may not dictate to him, or restrain him, much less make any kind of diplomatic intercourse on his part an indictable offence. But by a rash, headstrong, wilful course of negotiation carried on against the best and plainest interests of the country, although without any traitorous design, he might plunge the nation into a most unnecessary and disastrous war. For such an act he would be impeachable. Again: the President as Commander-in-Chief has the sole power to wage war. Congress may not dictate to him the campaigns, marches, sieges, battles, retreats, much less make any method of conducting the actual hostilities an indictable offence. But if his conduct was something more than a mere mistake in the exercise of his discretion, although not an adhering to the enemies of the United States giving them aid and comfort, he might, by a stubborn and wilful persistence in his plans after their failure had demonstrated their futility, bring defeat, disgrace, and ruin upon his country. For such an act he would be impeach-

able. Many more instances might be given, but these are sufficient for illustration.

§ 720. These two theories will now be subjected to a brief examination, and considerations will be suggested which seem to support the latter, and to give it a preference over the one first stated. A fallacy which often enters into discussions upon the meaning of language, is the tacit or open assumption that two alternatives alone are possible; that if one extreme is rejected, the very pole of this position must be admitted. The fallacy is shown in the present case. It may be said, it is said, that if the House be not restricted to indictable crimes, they may impeach whenever a majority shall choose, they may impeach for a mere difference of opinion. This argument *ab inconvenienti*, though often resorted to, is of little value. The possible abuse of power is no valid objection to the existence of the power. The Constitution is full of grants which may be abused; wherever there is a discretion, there may be abuse. Indeed it was because discretion must be given, and is liable to abuse, that the convention and the people, after exhausting all the checks of a tripartite government and of frequent elections, inserted the particular and most compulsive sanction of impeachment. The theories stated may be examined (1) by the aid of such authoritative precedents as have been established in the course of our political history, and (2) upon principle independent of positive authority.

§ 721. As far as the House of Representatives and the Senate have already acted, under the impeachment clauses, their proceedings have been directly opposed to the first theory, and in strict accordance with the second. It must be remembered that, if the argument for a restrictive interpretation be valid for any purpose, it proves that an impeachment is only lawful when the officer has been guilty of a statutory offence against the United States. To say that he may be impeached for an act which would be indictable by the English common law though not made so by the legislation of Congress, is to surrender the whole position. If the House may prefer charges for conduct which is not penal by the law of the United States, but is criminal by that of England, they are of course entirely

untrammelled. The legislation of another nation, whether statutory or unwritten, cannot be a rule of conduct for the United States government, cannot be the measure of its powers. How then does the fact stand? The House has preferred an impeachment in five cases. The first was dismissed by the Senate on the preliminary objection that the respondent was not a civil officer. The other four were tried on the merits. In two instances the accused was convicted, and in two was acquitted. In three of these cases not a charge was made in the Articles of Impeachment presented by the House, which imputed an indictable statutory crime to the respondent; most of the charges did not even impute a common law misdemeanor; all, with perhaps a single exception, alleged a corrupt or wilful violation of official duty. In the fourth case the offence was treason. I add a more detailed examination of these precedents in the foot note.<sup>1</sup> The House in proposing

<sup>1</sup> Case of Judge Pickering. — See Annals of Congress, 8th Congress, 1st Session, pp. 315-368. A. D. 1803-4. — Abstract of the Articles: I. A ship was arrested for violating the revenue laws; proceedings for condemnation were held before Judge P.; allegation, that he delivered said vessel to the claimant without requiring a certain certificate prescribed by an act of Congress, contrary to this act, and "with intent to evade the same." II. Allegation, that on the trial touching said ship, he refused to hear the testimony of witnesses produced on the part of the U. S., "with intent to defeat the just claims of the U. S." III. Allegation, that he refused to allow an appeal by the U. S. from his decree in said case, contrary to an act of Congress, "disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the U. S." IV. Alleged acts of personal immorality done in so public a manner as to degrade the office.

The respondent did not appear. He was found guilty on each article by a vote of 19 to 7, and was removed by a vote of 20 to 6.

Case of Judge Chase. — See Trial of Judge Chase, also Annals of Congress, 8th Congress, 2d Session, pp. 81-676. A. D. 1804-5. Abstract of the Articles. I. Allegation, that on the trial of one Fries for treason, the respondent was arbitrary, oppressive, and unjust, in expressing an opinion calculated to prejudice the jury against the prisoner, in preventing prisoner's counsel from citing certain authorities, and in preventing said counsel from addressing the jury upon the law. II. Allegation, that on the trial of one Callender for libel, he refused to excuse a juryman who had made up his mind. III. Allegation, that on the same trial he would not permit the evidence of a certain material witness to be given. IV. Allegation, that on the same trial his conduct was marked by manifest injustice and partial-

Articles, and the Senate in trying the accusations, have therefore given a practical construction to the Constitution. In doing so they have not restricted its operation within narrow

ity, — stating particular instances of arbitrary acts towards the prisoner's counsel. V. Allegation, that contrary to law he caused said prisoner to be arrested and committed to custody, instead of causing him to be summoned to appear at the next court. VI. Allegation, that he caused said prisoner to be held for trial during the term at which he was indicted, contrary to law. VII. Allegation, that at a certain Circuit Court he informed the grand jury of a certain seditious printer, and urged them to inquire into the case, thus degrading the judicial office, and lowering himself to the level of an informer. VIII. Allegation, that at another Circuit Court, he delivered an intemperate political harangue in his charge to the grand jury, thereby degrading the judicial office. In some of the articles an intent to oppress the prisoners Fries and Callender was imputed, in others arbitrary and unjust or scandalous behavior, but in none was any felonious or other technical criminal intent charged. (Chase's Trial. Vol. 1. pp. 5-8). In his answer the respondent insisted that none of the allegations made against him charged any "high crime or misdemeanor" within the meaning of the Constitution, for which he was liable to impeachment. He also answered each article on the merits, and while admitting many of the important physical acts alleged to have been done by him, justified them all, and expressly negatived all evil intent, and all arbitrary and wilful character in his conduct. (Trial, v. 1, pp. 25-103). After an elaborate trial, in which evidence was offered upon each Article, he was acquitted, although a majority of the Senate voted guilty on Articles III., IV., and VIII.

Case of Judge Peck. A. D. 1830. — See Trial of Judge Peck. — Abstract of Articles. I. Allegation, that Judge P. having published an opinion in a certain case before him, one Lawless, counsel for a party to the case, published an answer thereto in the newspapers. Thereupon Judge P. procured him to be arrested for contempt, imprisoned him for twenty-four hours, and suspended him from practice for eighteen months. The answer of the respondent justified all his acts, and expressly negatived all allegations of arbitrary or oppressive conduct, and of evil intent. He was acquitted by a vote of 22 to 21.

Case of Judge Humphries, A. D. 1862. — The Articles all charged the crime of treason. The respondent was convicted.

From the foregoing abstract it appears beyond a doubt that in the first three cases the two Houses proceeded upon the enlarged view of their powers. In all these cases, the objection that no indiotable offence was charged, if it be such, appeared upon the face of the Articles, and no amendment could possibly cure it; it was analogous to a pleading fatally defective upon general demurrer. Moreover in Judge Chase's case, the



limits, and have not confined the proceeding by impeachment to indictable crimes against the United States.

§ 722. But we are to inquire which of these theories is in most complete harmony with the general principles of constitutional construction. The two branches of the argument which support the first, lead to the same conclusion, and although somewhat different in form, are in fact identical. Each is built upon a single premise, and if this be incorrect, the whole falls with it. The first mode of statement rests upon the assumption that impeachment under the Constitution means the same as impeachment by the English law, and that the Houses of Congress have only the authority in the matter held by the Houses of Parliament. The second mode of statement rests upon the assumption that "high crimes and misdemeanors" is to be taken in a strict technical sense as a phrase of the English law equivalent to "felonies and misdemeanors," and that the words are not merely indicative and descriptive of general classes of acts.

§ 723. This whole theory is therefore another illustration of the constant tendency among political writers and statesmen to

objection was specially pleaded by the respondent, the demurrer was actually put in. It is true that in the trial of Judge Pickering, the respondent did not appear. But can it be supposed that in a Senate composed largely of able lawyers, the fatal defect would not have been pointed out, if it had been assumed to exist? It is true that Judge Chase was acquitted. But the Senate went to trial on the merits, notwithstanding a plea was put on the record, denying their jurisdiction on the ground that no indictable offence was charged. The respondent was acquitted because the proof failed to establish any evil intent or arbitrary and oppressive design. It is rather curious, too, that in two of the Articles upon which a majority were against him — the 4th and 8th — no act or intent was charged which could possibly amount even to a common law misdemeanor. If the theory I am examining be correct, the Senate had no jurisdiction to try either of these impeachments; the proceedings should have been dismissed upon the presentation of Articles which did not allege an impeachable offence; the same steps should have been taken which were taken in Blount's case. That the Senate did not so act, but heard the cases on the merits, is proof positive that they did not adopt this theory; their proceedings in Chase's case, where the record presented the point, is proof positive that they formally and judicially rejected this theory.

argue from the British Constitution to our own, without any regard to the fundamentally different ideas upon which they are based, and the fundamentally different methods by which these ideas are made practical. The powers of Congress are measured by those of Parliament, the powers of the President by those of the Crown. The principle that words having a technical meaning in the English jurisprudence as it stood when our organic law was framed, are to receive the same and no greater meaning if found in the Constitution, has been advocated in every great political and forensic contest which has arisen since the organization of the government. This principle, as far as it purports to embody a general rule of interpretation, has been repeatedly repudiated by the judiciary and by the political departments. Thus, Congress has given to the words "Admiralty" and "Bankruptcy" a far broader signification than belonged to them by the English law when the Constitution was adopted, and the courts have approved the legislative construction. The true rule would seem to be this: Where words having a well known technical sense by the English law are used in the Constitution, and these words are the keys of clauses which protect the private rights and liberties of the people, and especially of clauses which impose direct restraints upon the government in respect of such rights and liberties, and the technical sense itself is necessary for the complete protection of the individual citizen, this signification must still be retained in any interpretation of those provisions. But on the other hand, where words which had a technical meaning by the English law, are used in clauses which relate to the general functions of legislation and of administration, and to the political organization and powers of the government, such a sense must be attributed to them as will best carry out the design of the whole organic law, whether that signification be broader or narrower than the one which had received the sanction of the English Parliament and Courts.

§ 724. Applying this criterion, we must reject the interpretation which makes impeachment under the Constitution co-extensive only with impeachment as it practically exists in England. The word is borrowed, the procedure is imitated,

and no more; the object and end of the process are far different. We must adopt the second and more enlarged theory, because it is in strict harmony with the general design of the organic law, and because it alone will effectively protect the rights and liberties of the people against the unlawful encroachments of power. Narrow the scope of impeachment, and the restraint over the acts of rulers is lessened. If any fact respecting the Constitution is incontrovertable, it is that the convention which framed, and the people who adopted it, while providing a government sufficiently stable and strong, intended to deprive all officers, from the highest to the lowest, of any opportunity to violate their public duties, to enlarge their authority, and thus to encroach gradually or suddenly upon the liberties of the citizen. To this end elections were made as frequent, and terms of office as short, as was deemed compatible with an uniform course of administration. But lest these political contrivances should not be sufficient, the impeachment clauses were added as a sanction bearing upon official rights and duties alone, by which officers might be completely confined within the scope of the functions committed to them. We cannot argue from the British Constitution to our own, because the English impeachment is not, nor was it intended to be, such a sanction. But the English law recognizes a compulsive measure far more terrible, because far more liable to abuse than impeachment. What the British Commons and Lords may not do by impeachment, the Parliament may accomplish by a Bill of Attainder. If the Commons can only present, and the Lords can only try, articles which charge an indictable offence, there is no such restriction upon their resort to a Bill of Attainder, or of Pains and Penalties. The Constitution has very properly prohibited this species of legislation; but the Constitutional impeachment was intended to partially supply its place under another and better form, by introducing the orderly methods of judicial trial, and by requiring a majority of two thirds of the Senate to convict.

§ 725. The same considerations will apply with equal force to that branch of the argument which is based upon the phrase "high crimes and misdemeanors." Even had the words been

“felonies and misdemeanors,” we would not be obliged to take them in a strict technical sense; they would be susceptible of a more general meaning descriptive of classes of wrongful acts, of violations of official duty punishable through the means of impeachment. But in fact the language used cannot be reconciled with the assumed technical interpretation. The phrase “high crimes and misdemeanors” seems to have been left purposely vague; the words point out the general character of the acts as unlawful; the context and the whole design of the impeachment clauses show that these acts were to be official, and the unlawfulness was to consist in a violation of public duty which might or might not have been made an ordinary indictable offence.<sup>1</sup>

§ 726. These views are strengthened by a reference to the practical results which would follow from the restriction of impeachment to those offences that had been made indictable. Such a construction would remove from this sanction its chief compulsive efficacy. The importance of the impeaching power consists, not in its effects upon subordinate ministerial officers, but in the check which it places upon the President and the judges. They must be clothed with an ample discretion; the danger to be apprehended is from an abuse of this discretion. But at this very point where the danger exists, and where the protection should be certain, the President and the judiciary are beyond the reach of Congressional legislation. Congress

<sup>1</sup> It is sometimes proper to meet a very narrow argument by a very narrow answer. In truth the word “crime” was not a word of strict technical import, was not a term of art, in the English law when the Constitution was adopted, much less the words “high crimes.” “Crime” was of course used in literature and in conversation, and was found in treatises by approved writers on law, such as Blackstone. But if we go to indictments, which were drawn in accurate legal phraseology, we shall not discover the word “crime” or “criminally” employed. The accused was alleged to have done an act “feloniously,” or “wrongfully” or “unlawfully,” or “with force and arms,” or “against the peace of our lord the King,” but never “criminally.” If it appears then that “crime” was not a technical word of art, but only a word of general description, the whole of this branch of the argument at once falls to the ground. And if “crimes” be not a word of art, the inference is irresistible that “misdemeanors” is also used in a general descriptive and not in a technical sense.

cannot, by any laws penal or otherwise, interfere with the exercise of a discretion conferred by the Constitution. Even had the legislature been clothed with express authority to define and punish crimes generally, they could not make criminal any kind of act which the Constitution permits the President or the judges to do, and subject these individuals to indictment therefor. But in fact the express authority of Congress to define and punish crimes, is very limited. If the offence for which the proceeding may be instituted, must be made indictable by statute, impeachment thus becomes absolutely nugatory against those officers and in those cases where it is most needed as a restraint upon the violations of public duty.

§ 727. As far as can be gathered from their proceedings and debates, the convention which framed the Constitution did not intend to limit the operation of the impeachment clauses to indictable offences. At an early stage of the discussions, the following was added to the series of general propositions respecting the President: "He shall be removed on impeachment and conviction of malpractice or neglect of duty." This form was preserved through all the important debates upon the impeaching power. No suggestion was made that an offence must be indictable in order to be impeachable. The opposition came from another quarter. Gouverneur Morris, who favored a very short term of office, objected to the provision because it would destroy the independence of the Executive; but when the term was fixed at four years he withdrew all opposition. The propositions having been referred to a committee, they were reported back with the clause as follows: "He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption." A reference of the whole draft having been made to a revising committee, they reported back the clause so changed as to make the President removable upon impeachment and conviction "for treason or bribery." A short debate arose upon this report. Col. Mason objected to the provision because it was not broad enough. He urged that the President might

be guilty of many public offences besides bribery and treason. He said, "As bills of attainder are forbidden, it is more necessary to extend the power of impeachment." He moved to add the words "or maladministration." Mr. Madison objected to this term as too vague. Gouverneur Morris saw no harm in it. Col. Mason then withdrew the proposed words, and substituted "and other high crimes and misdemeanors against the state," which was adopted. The revising committee finally reported the clause as it now stands.<sup>1</sup>

When the Constitution was presented to the people for adoption, one of its most able opponents was Luther Martin. In his celebrated letter to the Maryland legislature he objected with great vehemence to the Presidential powers and office. He also considered the effect of the impeachment clauses. Had they been deemed insufficient in theory to meet the dangers he feared, no man would have been more ready or able to point out the defect, because no man was more conversant with the English law than he. But he distrusted the efficacy of impeachment, not because it was inapplicable to any offences except those against positive law, but because he believed the House would never impeach.<sup>2</sup> Mr. Madison, in 1789, expressed his opinion in the most formal and authoritative manner that the President is impeachable for "the wanton removal of meritorious officers."<sup>3</sup> These references indicate how the impeaching power was regarded by the framers of the Constitution.

§ 728. (3.) *What Punishment may be inflicted.* — The Constitution prescribes the nature and limit, — removal from office, and disqualification from holding office. The Senate can inflict no different punishment, but is not required to impose the entire penalty. A sentence of removal would be valid, although disqualification were not also imposed. But if the offence be also an indictable crime, the liability to the ordinary process of the criminal law still exists.

<sup>1</sup> See Journal of the Convention, 1 Elliott's Deb. pp. 158, 213, 222, 228. Also Madison's Debates, 5 Elliott's Deb. pp. 149, 335, 340-343, 366, 380, 507, 528.

<sup>2</sup> See § 644.

<sup>3</sup> See § 649.

May the officer impeached be suspended from the exercise of his official duties during the pendency of the proceedings before final judgment of conviction or acquittal? The President, Vice-President, and judges clearly cannot be suspended, either by any act of the House of Representatives, or by any law of Congress. The Constitution certainly gives no express power to suspend; whatever authority exists must be derived by implication from other sources. One fact is absolutely conclusive upon this question, without any minute criticism of particular expressions in the Constitution. The President, Vice-President and judges while their offices exist, are placed by the Constitution in a position entirely independent of the legislature; their terms of office are fixed; they, as well as Congress, derive their authority from the fundamental law; the only mode of removing them is by an impeachment, trial and conviction. This proceeding is not a legislative but a judicial act. Congress as a body does not remove, but the House accuses and the Senate tries and convicts.

In respect to subordinate ministerial officers I think the power exists. These offices are created by law; the Constitution does not prescribe any length of term, but Congress has this matter at its complete disposal. It would seem, therefore, that the legislature may, by general statute, provide for suspending all subordinate ministerial officers from the exercise of their functions during the pendency of an impeachment against them. I do not think the measures of arrest and bail, or confinement in ordinary criminal proceedings have any analogy to this process of suspension; nor do the English precedents, however numerous, give any aid in the interpretation of the Constitution in this respect.

## CHAPTER VI.

### THE JUDICIAL POWERS OF THE UNITED STATES GOVERNMENT.

§ 729. Article III., Section I. provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Section II. is as follows: "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty, and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before-mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." In this connection should be read Article XI. of the Amendments. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

An exhaustive treatment of the judicial powers as now exercised in fact would require me, (1) to examine what powers in the aggregate may be wielded by the national judiciary, or



in other words, what jurisdiction has the Constitution directly conferred, or authorized the Congress to confer ; (2) to describe the extent to which Congress has acted, or in other words, how far it has passed laws which confer the jurisdiction which may be given ; and (3) to explain the organization of the national courts, and the distribution of functions among them. The first only of these topics belongs, however, to the department of Constitutional Law, and it alone will be considered in this work.

§ 730. As introductory to the particular matter of this chapter a few observations will be made upon the nature of jurisdiction in general. Jurisdiction is, in brief, the power of a court to decide. To state the same fact in another form, it is the power or capacity of a court to grant a remedy, and thus to protect some primary legal right, and enforce some primary legal duty. It may therefore be contentious, where the existence of the right and duty is denied, and must be established before the remedy is granted ; or it may be *ex parte* or non-contentious, where the existence of the right is admitted, and only some formal act of a court is necessary in order that the right may be protected or enforced.

The jurisdiction residing in all tribunals of justice, may be considered in respect of its several kinds, classes, natures, and grades or degrees, and also in respect of the sources from which it is derived. When jurisdiction is considered in respect of its various kinds, classes, natures, and degrees, we shall find several distinct lines of division, based upon different ideas, and often crossing each other.

§ 731. In relation to the mere form and kind of the remedy administered by the courts, there are in England and America the familiar departments of civil and criminal jurisdiction ; the one being the power to administer a remedy on the application of a private suitor, for the establishment, protection, or enforcement of a private legal right ; the other, the power to administer a remedy on the application of the state, for the punishment of a breach of a duty to society. Again : in relation to the mere form and kind of the remedy administered, there are in England and America the well known divisions of Common Law, Equity, Admiralty, and Probate jurisdiction ; and in

England the special case of Ecclesiastical jurisdiction growing out of the union of church and state. The common law jurisdiction is both civil and criminal; the admiralty, though mainly civil, has a criminal side; the equitable and the probate are purely civil.

§ 732. In relation to its nature, jurisdiction of all kinds is either original or appellate. All the courts which exercise any power to administer a remedy, must exercise it in one of these two forms. Original jurisdiction is the power to hear and decide a legal controversy, or to administer a remedy, in the first instance. Courts in which suits may be brought, or which may grant some special remedies, are, in respect of such suits and special remedies, tribunals of original jurisdiction. The appellate, on the other hand, is entirely a power to review the act, or decision, or determination of some other court, the appellate tribunal being generally considered as superior to the one whose decision is appealed from and reviewed. It is plain that there is nothing in the nature of things to prevent the same court from possessing both an original and an appellate jurisdiction. In fact, as the judicial machinery of England and of America is organized, there is an ascending series of courts, many of those which are intermediate having both the original and the appellate jurisdiction. In the United States system there are three grades of tribunals, the District Courts, the Circuit Courts, and the Supreme Court. The first of these possesses only an original jurisdiction; the second is clothed with both; the Supreme Court is chiefly appellate, but some special original jurisdiction of great importance is conferred upon it.

§ 733. Jurisdiction may be exclusive, or concurrent. A court possesses an exclusive jurisdiction when it alone can take cognizance of a particular class of cases, or can administer some particular remedy. Thus, by the combined operation of the Constitution, and of statutes of Congress passed in virtue thereof, the national courts have a jurisdiction exclusive of the states over certain classes of cases, as for example, suits for the infringements of patent rights, admiralty causes, and many others. Two or more courts have a concurrent jurisdiction

when the suit or proceeding might have been originally instituted in either, at the will or election of the suitor.

§ 734. In relation to the extent of the power which courts possess to hear and determine, their jurisdiction is general, or limited. The word general, used in its broadest sense, would imply that the court had authority to hear and determine any and all suits and proceedings of every description which may be instituted to enforce, protect, or establish legal rights; while the word limited would imply that the court was restricted in its authority to some particular kinds or classes of suits or proceedings. If this wide significance were given to the word general, there is no court in England or America which possesses a general jurisdiction. There is plainly none in America, because all state courts are prevented from entertaining some special classes of suits which are confided exclusively to the national tribunals, while these latter are hedged about by the provisions of the Constitution which confine their powers within comparatively narrow bounds. The word, therefore, as descriptive of jurisdiction, is used in a sense much less broad. Certain kinds of courts are, from their very nature, plainly limited; the peculiar functions which they wield forbid the use of the word general as applied to them. Thus, courts purely and distinctively admiralty, or probate, do not possess a general jurisdiction; although we might with propriety denominate them — if the fact were so — courts of general admiralty, or of general probate jurisdiction, that is, courts in which all admiralty, or all probate matters might be originally brought.

§ 735. The epithet general, as descriptive of jurisdiction, and as designating a class of courts, is only applied to common law and equity tribunals. A common law court possesses general jurisdiction, when it may originally entertain all actions or proceedings by which common law remedies are administered, and rights strictly legal enforced, without restriction as to the nature of the controversy, or the situation of the parties, except such as the modes of practice and procedure adopted, have established. An equity court possesses general jurisdiction, when it may originally entertain all actions and proceedings by which equitable remedies are administered, and equitable

rights are enforced. In England the three superior courts, the King's Bench, the Common Pleas, and the Exchequer are examples of the former class; the High Court of Chancery, of the second class. In the United States all the state tribunals are, by the operation of the National Constitution, deprived of certain functions which belong to the superior courts of law and of equity in England. Bearing this important restriction in mind it may be said that each state contains at least one court of general jurisdiction, which, in most instances, extends to cases both in law and equity. None of the United States Courts, as we shall see in the sequel, can properly be said to have a general jurisdiction.

§ 736. The great majority of courts plainly possess but a limited jurisdiction, whatever be the form and nature of the particular remedies which they administer. Indeed it would hardly be proper to assume the kind of remedy which any court is competent to grant, as the criterion or test of the extent of its jurisdiction. If we should suppose that one tribunal might entertain and determine suits based upon all possible causes of action, but was restricted to a certain class of remedies, while another tribunal might entertain and determine suits based upon the very same states of facts, but was limited to the use of an entirely different class of remedies, we would properly say of each that it possessed a general jurisdiction. What then is meant by the term limited, as applied to courts? It is opposed to general, as the latter has been defined. The limitation imposed upon the jurisdiction of any particular court, may have respect solely to the subject-matter of the action or proceeding which is entertained therein; or solely to the persons who, as parties, may prosecute or be prosecuted therein; or to these two combined.

§ 737. 1. *The Subject-matter of the Action.* — I speak now of this limitation independent of all others. It involves the fact that any person capable of proceeding or being proceeded against at all, may prosecute or be prosecuted in such courts; but that such persons can only institute suits based upon certain specified causes of action, can only seek relief for certain particular breaches of primary rights, or for breaches of certain

particular primary rights. This restriction upon the subject-matter over which the court has jurisdiction, may relate to several different elements or characteristics of that subject-matter. It may have reference exclusively to the essential nature of the cause of action; that is, to the very nature of the primary right or the breach thereof. Thus courts of probate are confined to a narrow and accurately defined field of activity. The jurisdiction of admiralty courts is limited to a very special class of forensic disputes. This species of limitation rests, to a very great extent, upon the national courts. The restriction upon the subject-matter over which a court has jurisdiction, may also have reference solely to the amount of the claim, or the value of the property involved in the controversy. Or it may be based upon the locality of the cause of action; that is, upon the situation of the property which is in dispute, or upon the place where the cause of action arose, if it do not relate to the ownership of, or injury to, fixed property.

§ 738. 2. *The Parties to the Action.* — This limitation extends to those cases only where some peculiar character impressed upon the person, or some peculiar circumstance affecting him, is necessary to give the court jurisdiction over him either as the party prosecuting or the party defending; so that when this necessity is met, any subject-matter may be drawn within the sphere of judicial action. The restriction as to persons may have reference to some peculiar status or official character of the litigants. Thus the Constitution gives to the Supreme Court a jurisdiction in all matters affecting ambassadors, other public ministers, and consuls. By far the most common form of this limitation has respect to the residence or locality of the parties. The Constitution makes the residence of parties a criterion or test of the jurisdiction held by the national courts, without any reference to the subject-matter of the controversy; it gives those tribunals the power to entertain and decide all controversies between a state and citizens of another state, between citizens of different states, and between a state or citizens thereof, and foreign states, citizens, or subjects.

In the case of many inferior courts these two general species

of restriction — that upon the subject-matter and that upon persons — are combined in determining the extent of jurisdiction.

§ 739. Whence do courts derive their jurisdiction? I answer, either from the common law, or from statutes, including our written constitutions under the latter head. It must be observed that there is a wide difference between the creation and organization of a judicial tribunal, and the conferring jurisdiction upon it. All the courts in our country, state and national, are the creatures of constitutions or statutes; all, however, do not derive their jurisdiction from the same source. It may be said generally that when an American court draws its powers from the common law, it possesses all the functions which were held by the co-ordinate courts in England, except so far as those attributes have been limited or taken away by the organic law or by positive legislation. On the other hand, those courts which draw their powers from constitutions and statutes, possess those functions alone that have been expressly conferred, and cannot aid or enlarge their authority by appealing to the unwritten law behind the statute.

It is a settled doctrine that the national courts are clothed with no common law jurisdiction, but derive all their powers from the Constitution and laws of Congress enacted in pursuance thereof, and are therefore bound by the express grants contained in the organic law and in this positive legislation. The limits of their authority are thus fixed; Congress may perhaps fail to come up to those boundaries; it cannot pass them.

§ 740. With this outline of the nature, extent, and sources of jurisdiction in general, I pass to the special subject of the present chapter.

No one will deny that in every community claiming to be a nation, the supreme government should possess a judicial power commensurate in all respects with its power of legislation. Indeed, without such judicial power, the power of legislation would be either a nullity, or an irresponsible and arbitrary tyranny. It would be a nullity, because all laws

involve the idea of a sanction to enforce the command ; without the sanction the command would simply be a request or the expression of a wish. In civilized countries, the judiciary, in effect, wields the sanctioning authority ; it enforces penalties of one sort or another for the breach of public and of private rights. It is plainly necessary, therefore, that this sanctioning authority, or authority to enforce, should be coextensive with the legislative authority, or authority to create law. Just so far forth as the former should fall short of the latter, the laws would either be nullities, or would be arbitrarily executed by the ministerial officers. Of course it is not indispensable that each particular tribunal should possess functions equal in extent to those of the legislature ; there may well be grades of courts. But the judicial system as a whole must, if the energies of the nation and the liberties of the people are to be preserved, be equal in the field of its operations to the law-making department. Thus we find in England, side by side with an omnipotent Parliament, a number of superior courts clothed with a general jurisdiction. In our own country the states under the National Constitution, possess but a limited legislative authority ; in respect to many important subjects their power to enact laws is taken away. But they have all established a judiciary with functions commensurate with the legislative attributes conferred upon them by the people of the nation.

§ 741. In the next place, it may be affirmed that the judiciary need have no greater degree or amount of power than that held by the supreme legislature of a state or nation. Indeed, as far as such an excess of power should be expressly granted to the courts, it would be unnecessary and likely to produce great evils, except in very peculiar circumstances, such as those which will be mentioned in the sequel ; as far as it should be assumed by them, the act would be a palpable usurpation. These principles which seem to be elementary and fundamental, to be a part of the very axioms of political science, are of the utmost importance in this discussion, for by them we must test the jurisdiction which may be wielded by the national courts.

§ 742. There was no plainer note of the unnational character of the early confederated government, than the absence of any judiciary of the United States. But the contrivers of that unfortunate plan were at least logical and consistent. As there was no judiciary, there was no Executive; the utterances of the Congress were not addressed to individuals as commands, but to assumed sovereign states, as requests or recommendations. When the Convention determined to frame a government which should express the national idea, be founded upon the fact of an existing nationality, and be clothed with national attributes, the necessity of a national judiciary was at once conceded. The important question to be determined was, the amount, extent, and nature of the jurisdiction to be conferred upon that system of courts in the aggregate. Reasoning *a priori*, it must be said that as far as the powers of Congress or of the Executive extend, so far should the powers of the judiciary extend; as far as the legislation of the national government or the acts of the Executive are supreme, so far should the jurisdiction of the courts, and their decisions in accordance therewith, be supreme. Where the legislature is authorized to make laws, the courts should be authorized to expound them, and apply the sanction; where the laws thus made are binding upon the community, and superior to all local and state legislation, the expositions made and the sanctions applied by the judiciary should be equally binding and superior.

§ 743. The correctness of this reasoning no one can deny. Strip the national government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the government of the ability to make that sanction supreme, and we equally invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions, in the particular state where made, of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals, could only be prevented in one



of two ways; either by removing from them the power to decide at all upon rights and duties which spring from the national legislation, and conferring the function exclusively upon the United States courts; or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts, and rendering the local decisions reviewable by the United States judges who could in this manner enforce their attribute of supremacy in relation to the matters under consideration. In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall adopt one or the other alternative, is a mere question of policy; it may do either. I remark in passing, that, as the true relations between the nation and the states become more clearly defined, this jurisdiction will be relegated entirely to that department where it theoretically belongs, — to the judiciary of the United States.

§ 744. If it had been the intention to make the government of the United States unlimited, then its judiciary should have been clothed with functions equally extensive, identical with those entrusted to the superior courts of law and equity in England. But such was not the design; such was not the fact. The new-made government was limited in the range of its legislative and administrative attributes; and so far forth as the jurisdiction of the national courts was to be based upon the existence of those attributes, it should partake of the same limitation; in theory and in general, it should have extended no farther. But the situation of the United States was pecu-

liar, and the ordinary rules of civil polity must be, in a measure, departed from. With a central government possessing restricted and well defined attributes, which were, however, supreme within their sphere, and which acted upon all the individuals composing the political society, there were the state governments, to which the people had confided all the functions not granted to their national rulers and not retained dormant by themselves, which acted independently of each other, and upon a portion of the same persons who were under the supremacy of the central authority. There was danger, then, that the rights of all citizens of the country at large might not be securely protected. If a citizen of the nation inhabiting one state were obliged to enforce a claim against an inhabitant of another state, even though the controversy should grow out of a matter over which the states have exclusive powers of legislation and administration, it might be that local prejudice, passion, or rivalry would prevent justice being done him in the courts of the latter commonwealth. The same would be true if a foreigner prosecuted the inhabitant of a state in its own tribunals. The states, as such, have no foreign relations, and their courts might not feel the necessity of preserving a condition of amity with foreign governments by doing complete justice to their subjects.

§ 745. From these considerations it was politic to clothe the United States judiciary with a power beyond the scope of the legislative and administrative functions held by the co-ordinate departments. In order to protect the citizen and the alien, it was expedient to permit the national courts to decide upon rights growing out of state laws, state acts, and causes completely within state control. But this supplementary jurisdiction should not be unlimited; it should extend no farther than the necessities of the case demand; it should not, therefore, depend upon the subject-matter involved in the controversy, but upon the situation and condition of the litigant parties. Moreover, this special jurisdiction should not be exclusive of the state courts; on the contrary, the latter should be left with a full liberty of concurrent action. Again, the decisions of the national judiciary made in pursuance of

this special power, need not be supreme and binding upon the states. It was enough that the particular party who appealed to the United States courts had complete justice done him in respect to the matter in dispute. Should their decisions upon subjects of this class be made supreme, the different states would be so far limited in the exercise of governmental powers that had been exclusively conferred upon them, and which had been denied to the national rulers.

Such seem to have been the considerations which suggested themselves to the framers of the Constitution, as the general principles to be followed in clothing the national judiciary with its peculiar functions. At all events the whole plan is arranged in accordance with these principles. We are now, therefore, brought directly to the inquiry, What jurisdiction in the aggregate does the organic law confer, or permit Congress to confer, upon the courts of the United States.

§ 746. If we analyze and arrange the several grants of power conferred, or allowed to be conferred, by the Constitution, we shall find that they may all be referred to one or the other of the two descriptions of jurisdiction already mentioned — the necessary and the supplementary or expedient. The necessary includes that jurisdiction which is based upon the intrinsic nationality and supremacy of the general government; without which that nationality and supremacy would have been but a name. It is evident that the following particular grants fall under this first head: “cases in law and equity arising under the Constitution;” “cases in law and equity arising under the laws of the United States;” “cases in law and equity arising under treaties made, or which shall be made, by the authority of the United States;” “cases affecting ambassadors, other public ministers, and consuls;” “cases of admiralty and maritime jurisdiction;” “controversies to which the United States shall be a party;” and “controversies between two or more states.” All these are preëminently within the scope of the national authority, and in theory they might well have been expressly withdrawn from the state jurisdiction. Congress may complete the work, and confer an exclusive authority over them upon the United States courts; it has done so in some instances.

§ 747. *Cases arising under the Constitution.* — We have seen that any national theory of our scheme of government, however partial it may be, demands that the government itself should be the final and absolute arbiter as to the interpretation of the Constitution, and as to the extent of the powers it grants and the restrictions it contains. The check and the only check upon this power, is the tripartite form of the government, and the direct responsibility of the rulers to the people. Assuming this proposition to be true, it is plain that the United States judiciary should have the power to decide all cases arising directly under the Constitution. As has been said before, a perfect theory would have made this function exclusive in the national courts; but if, from some peculiarities of our political organization, it was necessary that the state tribunals should in many instances have a concurrent jurisdiction over the same class of cases, their determinations should not be final, but should be reviewable by the judiciary of the nation. The necessity of this is evident to all those who do not adopt the state sovereignty theory and reject the very idea of one nationality. The Constitution is a unit; it speaks to every person within the bounds of the whole country; it addresses itself in compulsive terms to the state organizations themselves. Its interpretation should therefore be the same throughout the whole land; acts permitted under it in one portion or state, should not be forbidden in another. This homogeneity of the law which is declared to be supreme, is absolutely essential to the continued existence of the nation. But plainly such a oneness of legislation and administration can only be obtained by giving to the judiciary of the United States the power of determining all cases arising under the Constitution. Granting that the state courts may have concurrent original jurisdiction in some or all of these cases, that jurisdiction must be inferior, and their decisions must be under the control of the central tribunal.

§ 748. What are cases arising under the Constitution? They must all be referable to one or the other of the following heads: (1.) Where a right is asserted between two private individuals, claimed to flow from a statute of Congress, and

the contention is whether such statute was within the power of Congress to pass. (2.) Where an executive or judicial officer of the United States has done some act, or proposes to do some act, and the contention is whether the act is authorized by the Constitution. (3.) Where a right is asserted between two private individuals, claimed to flow from a statute of a state legislature, and the question is whether such statute is one which the legislature was forbidden by the Constitution to pass. (4.) Where an executive or judicial officer of a state has done, or proposes to do some act, and the question is whether the act is one forbidden by the Constitution. All these would be cases arising under the Constitution, for their decision would require an interpretation of the organic law, and a determination of the powers granted and refused by it. A single illustration of each head will suffice. At a late session Congress passed a statute most important in its general design and in its special provisions which is known as the Civil Rights Bill. Is this statute valid? It is evident that if the decision of this question were left to the state judiciary alone, there would be no uniformity in the rule adopted. In some states the law would be sustained, in others declared void; in the former the executive officers enforcing it would be considered as justified for their acts, in the latter they would be treated as trespassers and subjected to penalties. Such a condition of things would be unbearable. An act of Congress should be everywhere valid, or everywhere void. The only means of producing this result is to give a supreme and final jurisdiction over the question to the national courts.

§ 749. Again: during the late civil war, the President, through his subordinates, caused numerous military arrests to be made, and trials to be had before military commissions. Were these proceedings justifiable? Should the decision of this question be left to the local tribunals alone, an officer might be protected in one commonwealth from any penal consequences of his acts, and punished in another under exactly the same circumstances. Again: if the jurisdiction of the United States courts and judges was to be determined by the tribunals of the several states, a confusion would arise utterly destruc-

tive of the whole system. A judgment of the national courts would be respected in one state, and rights under it would be secure; in another, the same judgment would be treated as a nullity. Finally, the Constitution forbids the states to pass laws impairing the obligation of contracts. If the state courts are to be the sole judges of the meaning of this clause, and of what laws do impair the obligation of contracts, it would inevitably follow that a statute of the same character would be held valid in one commonwealth, and void in another. The uniformity in commercial and business transactions, which the Constitution endeavored to secure, would thus be destroyed.

§ 750. These instances sufficiently illustrate the nature of cases arising under the Constitution, and the absolute necessity of making the national judiciary the final and supreme, if not the sole, arbiter of all such questions. In respect to cases falling within the third and fourth of the preceding classes — those growing out of a state legislative or executive act, — it is evident that the original jurisdiction of the state courts should not be interfered with, should not be in the least lessened or impaired. Whatever authority is given to the United States judiciary should be entirely by way of review. Congress has acted upon this view, and has made provision by which the final determination of the state tribunal may be examined in the Supreme Court of the United States in cases where the validity of a state law or authority was drawn in question, and the decision was in favor of its validity.<sup>1</sup> Congress has evidently failed to exercise its power in this respect to the full extent.

Those cases which fall within the first and second of the preceding classes, which grow out of a national legislative or executive act, might be withdrawn completely from the state jurisdiction. Congress has not chosen to do so in all instances. But where the local courts are left to the exercise of the power to hear and decide, some provision should be made by which the national judiciary may exert its authority. The following cases have been provided for. The final determination of the state tribunal may be examined in the Supreme

Court of the United States, where the validity of a treaty or statute of, or of an authority exercised under the United States, was drawn in question, and the decision of the state court was against the validity.<sup>1</sup> In 1833 a statute was passed providing that when a suit is commenced in a state court against an officer of the United States or other person, for any act done under the revenue laws, or for or on account of any right, authority or title, set up or claimed by such officer or person under any such law, the suit may be removed from the state court into a circuit court of the United States.<sup>2</sup> A similar power of removal has been since extended to acts done under other statutes or under other species of authority of the United States.<sup>3</sup> Congress has thus partially legislated, whereas its ability to legislate completely is certain. If it may allow the suitors at their option to withdraw a case which arises under the Constitution or laws of the United States, from the state jurisdiction, it may by one blow, prohibit that jurisdiction altogether.

§ 751. *Cases arising under the Laws of the United States.*— Many cases arising under the laws of the United States, will also arise under the Constitution. This is true of all those which draw in question the validity of the law. But there are others which assume the law to be valid, and put a construction thereon; which ascertain the rights of persons affected by it; which examine the acts of ministerial officers done in virtue thereof, and determine whether these acts are warranted by the statute. The national judiciary should certainly possess a jurisdiction in all such cases, and in the exercise thereof should be supreme. Unless this were established, the positive legislation of Congress would become a chaos. Indeed, it is difficult to see, in reference to many classes of statutes, that the state courts should have any authority at all; the subject-matter of the legislation is such that it seems to fall exclusively under the national control. A single example will illustrate this proposition. Congress establishes a system of duties to be paid upon imported goods. Revenue laws are

<sup>1</sup> See "Judiciary Act" of 1789, § 25.   <sup>2</sup> 4 Statutes at Large, 632.

<sup>3</sup> Statute of March 3, 1863.

always complicated, and require judicial interpretation. The rate of duty payable upon a particular article may have been left uncertain, and must be established. This rate must be uniform for all parts of the country. If the state courts may entertain cases of this description, and put a construction upon a revenue law, there would be no actual uniformity throughout the United States, and the practical evils which existed under the old Confederation would be revived. Congress has been partially influenced by these considerations, and in some instances has conferred an exclusive jurisdiction upon the national courts, while in others it has provided for a removal of suits to those courts. In all those cases where the state courts are permitted to have a concurrent jurisdiction, it is provided that their final judgment may be reviewed by the Supreme Court of the United States when a statute or treaty of the United States was drawn in question, and the decision was against the right claimed by either party under the statute or treaty.<sup>1</sup>

§ 752. *Cases arising under Treaties.*— The general government has exclusive control over foreign relations ; it alone has power to enter into treaties ; these treaties are made by the Constitution the supreme law of the land. The states are expressly forbidden to make any international compacts ; they are not officially known in dealings with foreign communities. The general government is therefore charged with the most important duty of preserving its own rights and those of its citizens against other peoples and states, and of observing its own liabilities and those of its citizens towards such peoples. It is responsible for any and all infractions of treaties done either in its own name and by its own direction, or by any other authority, or by any private citizen. Where the responsibility rests, the power should also reside. It is therefore the province of the national government to give construction to treaties, and to judge of rights and liabilities arising therefrom. This function does not belong to the states, at least finally and supremely. For these reasons it is evident that the judicial department of the United States must have jurisdic-

<sup>1</sup> Judiciary Act of 1789, § 25.



tion over all cases arising under treaties, and that this jurisdiction should be either exclusive, or, if shared by the state courts, should be supreme over those local tribunals. As private rights of property are often based upon the stipulations of treaties, and as the state courts have a very general power to adjudicate upon this class of rights, it has not been deemed expedient to withdraw from them all jurisdiction over cases arising under treaties; the control of the nation has been preserved by the provisions made for a review stated in preceding paragraphs.

§ 753. *Cases affecting Ambassadors, other public Ministers, and Consuls.*— The considerations which were adverted to under the preceding head, apply with equal force to this. The exclusive control over foreign relations extends to the cases of public ministers as well as to treaties. But there is another consideration especially applicable to these foreign representatives. Ambassadors and other public ministers are, by the International Law, exempt to a very great extent from the civil and criminal jurisdiction of the country in which they reside. The exceptions to this rule are few in number, special in character, and based upon state necessities. Any interference with a foreign minister in violation of this rule is an insult to the independence and sovereignty of the nation which he represents. The interference is a crime of state against the government to which the ambassador is accredited, and demands an apology and reparation from that government proportioned to the offence. By our Constitution the national authorities are solely responsible for the observance of these rules of the International Law; they alone may judge whether the act of the foreign minister be such as to bring him within the exceptions to those rules; they alone should have jurisdiction of all cases affecting this class of officials. Were the state courts to assume the jurisdiction, they would not be restrained by the sense of responsibility for their acts; and if they were uncontrolled by the central government, they might, at any time, jeopard the relations existing between us and foreign powers. As consuls do not by the International Law, enjoy any such immunity, the reasons are not so strong

for conferring an exclusive jurisdiction over them upon the national tribunals. But as they are foreign representatives, acting under a foreign commission, charged with the duty of protecting foreign commercial interests, and often particularly mentioned in treaties, it was thought proper to place them under the control of the same courts. The Constitution gives to the Supreme Court an original jurisdiction in this class of cases. The "Judiciary Act" of 1789 made this jurisdiction exclusive in all actions brought *against* an ambassador or other foreign minister, but concurrent only in those brought *by* ambassadors and other foreign ministers, and in those where a consul is a party. It may be that the Constitution, by its very terms, deprives the state courts of all authority in any of these cases; at all events, the question can hardly be considered as definitely settled.

§ 754. *Cases of Admiralty and Maritime Jurisdiction.* — As the Congress of the United States has power to regulate commerce, and as admiralty extends over the high seas beyond the territorial limits of any particular state, it seems peculiarly necessary for the national courts to have jurisdiction in cases of this description. One class of proceedings falling under the general head of admiralty, should confessedly be within the exclusive authority of the United States tribunals. As the general government can alone carry on war, and as all captures are made by it or under its authority, and as it is responsible to neutral nations for the observance of neutral rights, all questions of prize taken in maritime war must be determined by the national courts alone. But the Supreme Court of the United States has very recently decided in *The Moses Taylor*<sup>1</sup> and *The Hine v. Trevor*<sup>2</sup> that the grant of the Constitution and the legislation of Congress thereunder have conferred an exclusive jurisdiction in all civil cases of admiralty upon the courts of the nation, and that this jurisdiction extends to the great inland navigable rivers and lakes, as well as to the tide waters.

§ 755. *Controversies to which the United States shall be*

<sup>1</sup> 4 Wallace's R. 411.

<sup>2</sup> Ibid. 555.

*a party.*— As the United States is supreme, sovereign, and independent, it should not be compelled to sue in the courts of another commonwealth, but should be able to bring actions in its own tribunals. This is particularly the case when the proceeding is against a person prosecuted for a crime. It would hardly be consistent with the dignity of the nation for it to enforce its penal laws in the courts of a subordinate power. In respect to civil actions the reasons are not so imperative. There is nothing in the nature of things to prevent one nation from prosecuting a private suit in the courts of another, but it should certainly be able to do so in its own.

§ 756. *Controversies between two or more States.*— Jurisdiction in these proceedings belongs to the nation as a part of its paramount sovereignty. As the several states stand towards each other in a condition of equality, none could, without its consent, be sued in its own courts, much less be compelled to appear and answer in those of the prosecuting commonwealth. But as the states stand towards the general government in a condition of subordination, they may well implead each other in the tribunals of their superiors.

§ 757. The foregoing enumeration exhausts the list of cases in which the United States possesses a jurisdiction which is necessary, which is a part of its essential attribute of paramount sovereignty. It will be noticed that in all except the cases of ambassadors, those to which the United States is a party, and those between two or more states, the jurisdiction is based upon the subject-matter of the controversy, without any reference to the character or situation of the parties; while in the three instances named the jurisdictional fact is the character of the parties without any reference to the subject-matter of the controversy or the nature of the cause of action. The principles which lie at the bottom of the judicial system of the United States, and which determine the extent of jurisdiction granted by the Constitution, and the particular applications of those grants which Congress has authority to make, were discussed in the most exhaustive manner, and settled in accordance with the national idea in the early cases of *Martin v.*

Hunter's Lessee<sup>1</sup> and *Cohens v. Virginia*,<sup>2</sup> and in the more recent case of *Ablemann v. Booth*.<sup>3</sup>

§ 758. The supplementary jurisdiction, or that based entirely upon considerations of expediency. — The grants of judicial power referable to this head are plainly the following: "Controversies between a state and citizens of another state;" "controversies between citizens of different states;" "controversies between citizens of the same state claiming lands under grants of different states;" and "controversies between a state or citizens thereof, and foreign states, citizens, or subjects." The peculiar reasons for conferring a power to hear and decide these controversies, have already been alluded to. They are all summed up in the desire to furnish a tribunal free from partisan influences in those cases where it was feared lest local interests might prevent perfect justice being done to suitors. When we examine these several grants of power, we perceive that, with one exception, the jurisdictional fact is found in the peculiar character and situation of the parties, and has no reference to the subject-matter of the controversy. If the parties fall within the terms of the requirement, there is no constitutional restriction placed upon the causes of action which may be the foundation of suits.

§ 759. Is the jurisdiction included within these several grants exclusively in the national courts, or held by them concurrently with the state tribunals? Plainly the latter is the true interpretation of the Constitution. In all these cases, the judiciary of the United States is not wielding a power which belongs to it of right, of necessity, but one which the state judges may also wield; a power relating entirely to state laws, to rights and duties flowing from state legislation. For the same reason this jurisdiction is not supreme; the decisions of the national courts by virtue thereof are not binding upon those of the states. These courts are not interpreting or enforcing the law of the United States in any of its forms; they are interpreting and enforcing the law of the particular state in which the controversy arose. The suitor, there-

<sup>1</sup> 1 Wheaton's R. 304.

<sup>2</sup> 6 Wheaton's R. 264.

<sup>3</sup> 21 Howard's R. 506.

fore, can only demand that his rights shall be secured according to a just view of the local law from which those rights are claimed to flow. The single duty of the national judges is to secure those rights according to their best understanding of that law; they cannot insist that their interpretation and their judgments shall be taken as a guide by the state tribunals in any subsequent cases. As a practical consequence of this principle there need not be, indeed there cannot be, any uniformity in the decisions of the United States judiciary made under this branch of their general authority. As there is great diversity in the state legislation, and as the courts of the nation simply expound and apply that legislation, there must be a similar diversity in the results of their labor. The practice of the Supreme Court of the United States is therefore firmly settled, that in all controversies falling within this department of their jurisdiction, they will follow the statutes and authoritative decisions of the local courts which have defined and established the law of the commonwealth where the cause of action arose.<sup>1</sup>

§ 759. It is not in accordance with my plan to describe the various national courts and the distribution of powers among them. A few important and general rules, however, which seem to form a part of our Constitutional Law, may well be stated.

The broad principle which lies at the bottom of these rules, and which was not established without a very vigorous dissent from many able jurists and statesmen, is, that the national courts have no common law jurisdiction whatever, and that all the powers they possess must be referred to the grants of the Constitution, or to these grants and laws of Congress passed in pursuance thereof.

<sup>1</sup> See *Luther v. Borden*, 7 Howard's R. 1: *Phalen v. Virginia*, 8 Ib. 163: *Webster v. Cooper*, 14 Ib. 504: *Beauregard v. New Orleans*, 18 Ib. 497: *Gelpcke v. Dubuque*, 1 Wallace's R. 175. It has been held, however, that upon questions depending upon general commercial law, or upon general equity jurisprudence, the court will not be bound by the decisions of the state courts. This rule seems to be inconsistent with the principles which should guide the court in this branch of its jurisdiction. See *Swift v. Tyson*, 16 Peters' R. 1: *Watson v. Tarpley*, 18 Howard's R. 517, 520: *Neves v. Scott*, 13 Ib. 268: *Nichols v. Levy*, 5 Wallace's R. 433.

The Supreme Court has an original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and in those to which a state shall be a party. This original authority cannot be abridged, — nor, on the other hand, can it be extended, by the legislature.<sup>1</sup>

In all other cases mentioned in Article III. Section II., the Supreme Court has appellate jurisdiction, “with such exceptions and under such regulations as Congress shall make.” All appellate jurisdiction must therefore be exercised in pursuance of positive statutes which must themselves fall within the constitutional grants. In fact, the legislation of Congress has fallen far short of the limits set by the organic law.<sup>2</sup>

In all cases excepting those affecting foreign representatives, and those in which a state is a party, the original jurisdiction is therefore given to “such inferior courts as Congress may, from time to time, ordain and establish.” The legislature has complete discretion in the creation of these subordinate tribunals; it may allot powers and distribute jurisdiction at will; it may confer upon them all the authority permitted by the Constitution to be given, or may grant but a small portion thereof. As a matter of fact, Congress has been very unwilling to clothe the national courts with all the functions which the Constitution recognizes as appropriate for them. The following principle results from these facts: The inferior courts possess no powers whatever except those included in the terms of statutes passed in pursuance of the Constitution. If the power invoked cannot be found in the statute, it does not exist, even though it plainly falls within some general clause of Article III. Section II. If the power be statutory, it is still a nullity if it transcends the scope of the constitutional grant.<sup>3</sup> The same principle has been applied to jurisdiction over criminals. There are no common law crimes within the authority

<sup>1</sup> *Marbury v. Madison*, 1 Cranch's R. 137.

<sup>2</sup> *Wisart v. Dauchy*, 3 Dallas' R. 321: *Clarke v. Bazadone*, 1 Cranch's R. 212: *United States v. Moore*, 3 Cranch's R. 159: *Durousseau v. United States*, 6 Cranch's R. 307: *Ex parte Kearney*, 7 Wheaton's R. 38: *Ex parte Watkins*, 3 Peters' R. 193.

<sup>3</sup> *Mossman v. Higgenson*, 4 Dallas' R. 12: *Hodgson v. Bowerbank*, 5 Cranch's R. 303: *Bank of U. S. v. Deveaux*, 5 Cranch's R. 61.

of the national courts; they must go to statutes of Congress alone as guides to determine what constitutes an offence against the United States.<sup>1</sup>

<sup>1</sup> Ex parte Bollman, 4 Cranch's R. 75: United States v. Hudson, 7 Cranch's R. 32: United States v. Coolidge, 1 Wheaton's R. 415: United States v. Bevans, 3 Wheaton's R. 336.

THE END.

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